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# Institutionalizing Ethics

Deborah L. Rhode

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# INSTITUTIONALIZING ETHICS

*Deborah L. Rhode<sup>†</sup>*

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LAW, as Reinhold Niebuhr once noted, is a "compromise between moral ideals and practical possibilities."<sup>1</sup> The same is true of lawyers' ethics. This Essay explores the terms of our current compromise by focusing on its institutional context. The aim is to survey changes in regulatory, market, and socialization structures that might respond to chronic problems of professionalism. Since its objective is to provide an overview, the following discussion cannot supply the detailed contextual analysis that would be necessary to evaluate certain initiatives. However, by pulling together the main themes of recent commentary on legal ethics, this survey may suggest better ways of institutionalizing our moral aspirations.

Discussion begins by summarizing the most frequently perceived problems of professional responsibility, those that involve overrepresentation, underrepresentation, and nonrepresentation of potential client interests. The first set of problems arises where pressures to pursue client objectives compromise broader societal values. Other difficulties result from pressures to subordinate client

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1. RHEINHOLD NIEBUHR, *THE NATURE AND DESTINY OF MAN* 302 (1941).

interests to lawyers' own needs. A final, but related group of problems involves issues of distribution: the lack of representation for a broad range of constituencies who lack the resources or incentives to address their legal needs. Although this catalogue by no means exhausts the ethical problems facing the profession, it offers a representative array of the most commonly noted concerns. Discussion also focuses on some less commonly acknowledged difficulties in conceptualizing these problems, which have led to corresponding difficulties in identifying solutions.

The remainder of the Essay surveys possible responses. Part II explores changes in regulatory structures, such as admissions, discipline, and judicial oversight. Part III summarizes market initiatives that could increase consumer information and professional competition in the delivery of legal services. The final section considers strategies of professional socialization in law schools, law firms, and alternative forms of bar associations.

Throughout this discussion, the organizing inquiry is how best to institutionalize ethical behavior: what works, what doesn't, and what more do we need to know to answer those questions? Underlying this analysis is the conviction that a fuller realization of professional ideals will require some fundamental changes in current regulatory policies, market incentives, and socialization patterns.

## I. PROBLEMS OF PROFESSIONALISM

Problems of professionalism arise from complex interrelationships among socioeconomic incentives, institutional structures, and professional ideologies. In some instances, these problems involve violations of existing rules; the difficulty lies in enforcement. In other instances, the conduct is at least arguably permissible; the difficulty lies in the content of the rules and in their economic and ideological foundations.

### A. *Overvaluing Client Interests*

#### 1. Neutral Partisanship

The central norm of contemporary American legal practice is one of neutral partisanship; the attorney's role is to advance client interests "zealously within the bounds of the law"<sup>2</sup> regardless of

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2. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-1 (1980).

the attorney's own assessment of their underlying merits. Although lawyers have certain obligations as officers of the court, these are quite limited and largely track the prohibitions on criminal and fraudulent conduct that govern all participants in the legal process.<sup>3</sup>

This neutral partisanship model rests on two assumptions. The first is that an adversarial clash between two zealous advocates is the best way to discover truth and to promote accurate legal decision making. A second assumption is that partisan advocacy provides the most effective protection for individual rights. Each of these assumptions has generated an extensive critique that is sufficiently familiar to require only a brief summary here.

The first assumption, that an adversarial clash yields accurate outcomes, is not self-evident. As many commentators have observed, this is not how most countries adjudicate disputes, how most professionals investigate facts, or even how most lawyers conduct inquiries outside the courtroom.<sup>4</sup>

In an adversarial model, the merits prevail only if the contest is a balanced one—that is, if each side has roughly equal access to relevant legal information, resources, and capabilities. Yet how often a fully balanced contest occurs in practice is open to doubt. American lawyers practice in a social order that tolerates vast disparities in wealth, makes most litigation enormously expensive, and allocates civil legal assistance almost entirely through market mechanisms. Under these circumstances, one would expect that the “haves” generally come out ahead.<sup>5</sup>

Among defenders of current partisan norms, the conventional “solution” to the problem of unequal advocacy “is not to impose on counsel the burden of representing interests other than those of

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3. See Eugene R. Gaetke, *Lawyers as Officers of the Court*, 42 VAND. L. REV. 39, 48-76 (1989) (identifying the obligations).

4. As Marvin Frankel has noted:

Despite . . . untested statements of self-congratulation, we know that others searching after facts—in history, geography, medicine, whatever—do not emulate our adversary system. We know that most countries of the world seek justice by different routes. What is much more to the point, we know that many of the rules and devices of adversary litigation as we conduct it are not geared for, but are often aptly suited to defeat, the development of the truth.

Marvin E. Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031, 1036 (1975).

5. Marc Galanter, *Why the Haves Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95 (1974). See Deborah L. Rhode, *Ethical Perspectives on Legal Practice*, 37 STAN. L. REV. 589, 597 (1985).

his client, but rather to take appropriate steps to ensure that all interests are effectively represented."<sup>6</sup> Exactly what those steps might be have never been satisfactorily elaborated. As subsequent discussion indicates, inequalities in access have been seriously confronted only at a rhetorical level.

A related problem involves the inadequacy of enforcement structures to ensure a fair adversarial contest. Conventional justifications for the neutral partisanship model assume that some neutral arbiter will sort out competing claims. Yet most lawyers work outside the oversight of any disinterested third party. Only a small part of legal practice involves litigation, and about 90% of litigated cases are resolved without trial. Even in cases involving neutral decision makers, we have no evidence about the relative effectiveness of partisanship in promoting justice. What we do have are substantial data suggesting that it falls short in too many circumstances.

Imbalances in representation, information, and resources are readily exploited under current procedural structures. The recent proliferation of civility codes and professionalism commissions testify to a widespread sense that partisanship norms are out of control. Surveys of discovery practices suggest the frequency of problems. In large, complex cases, lawyers report chronic abuses: "[T]he average litigant is over-discovered . . . overcharged, over-exposed and over-wrought."<sup>7</sup> In one in-depth study, 62% of Chicago litigators complained about over-discovery, 45% complained about harassment, and 80% complained about incomplete or evasive responses to requests. Lawyers who handled large cases reported that in about half the matters that were settled and in about 30 percent of those that were tried, they had significant information that was not discovered by opposing parties.<sup>8</sup> Similarly, in a survey of over 2500 litigators, about half of responding attorneys felt that unfair and inadequate pretrial disclosure of material information is a regular or frequent problem; three quarters believed that

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6. Abe Krash, *Professional Responsibility to Clients and the Public Interest: Is There a Conflict?*, 55 CHL. B. REC. Special Centennial Issue, 1974, at 31, 34.

7. *A Businessman's View of Lawyers*, 33 BUS. LAW. 817, 834 (1978) (comments of Lester Pollack); see also Jon O. Newman, *Rethinking Fairness: Perspectives on the Litigation Process*, 94 YALE L.J. 1643, 1644 (1985) ("[T]here can be little doubt that the system is not working very well. Too many cases take too much time to be resolved and impose too much cost upon litigants and taxpayers alike.").

8. Wayne D. Brazil, *Civil Discovery: How Bad Are the Problems?*, 67 A.B.A. J. 450, 451-56 (1981).

incomplete information presents such a problem.<sup>9</sup> Responses by those attorneys to a hypothetical question illustrate the problems at issue. Where a witness admitted lying during a deposition, about 40% of surveyed lawyers saw no need to correct the record before settling the case if the client would not agree to the correction.<sup>10</sup>

Smaller, more qualitative studies reveal a wide range of partisan practices that obstruct the search for truth. Common examples include: invoking technical defenses to defeat substantively meritorious claims; counseling destruction of inculpatory documents before their retention is clearly required; presenting evidence or testimony that a lawyer reasonably believes but does not "know" is false; adopting strained interpretations of the attorney-client privilege; preparing witnesses by guided tours down memory lane with predetermined destinations clearly in view; hiring experts based on the usefulness rather than quality or likely accuracy of their testimony.<sup>11</sup> Even in the absence of any abusive practices, accurate fact-finding is at best an unintended by-product, at worst an undesired outcome, of partisan efforts. The point of advocacy, as Socrates noted and subsequent experience confirms, is persuasion, not truth.<sup>12</sup>

The unqualified pursuit of client interests carries obvious costs: It obstructs the decision-making process, imposes unnecessary delays and expense, and deters meritorious claims. Although aggregate estimates of the problem vary, some smaller scale studies are illuminating. The Rand Corporation's analysis of asbestos litigation, for example, found that over a third of total compensation went for legal fees and costs.<sup>13</sup> The price of partisanship is borne not just by litigants, but also by the public generally in the form of higher prices, tax deductions for legal expenses, and government-

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9. Stephen D. Pepe, *Standards of Legal Negotiations, Interim Report for ABA Commission on Evaluation of Professional Standards* (1983).

10. *Id.*

11. Rhode, *supra* note 5, at 600. See generally MARVIN E. FRANKEL, *PARTISAN JUSTICE* 15 (1980) (perjury and witness preparation); PETER W. HUBER, *GALILEO'S REVENGE: JUNK SCIENCE IN THE COURTROOM* (1991) (expert witnesses); KENNETH MANN, *DEFENDING WHITE-COLLAR CRIME: A PORTRAIT OF ATTORNEYS AT WORK* 117-20 (1985) (document destruction).

12. See ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* 110-21 (1993); Anthony T. Kronman, *Legal Scholarship and Moral Education*, 90 *YALE L.J.* 955, 959 (1981).

13. In nationwide litigation, \$16 to \$19 billion in transaction costs were accumulated to recover \$14 to \$16 billion for injured plaintiffs. INSTITUTE FOR CIVIL JUSTICE, *THE RAND CORPORATION ANNUAL REPORT*, April 1991-March 31, 1992, at 51-54.

tal subsidies for adjudicative and administrative proceedings.

In response to such criticisms, proponents of neutral partisanship typically invoke a second line of defense. Whatever its effectiveness or efficiency in promoting truth, this partisan framework is an indispensable safeguard of individual rights. On this view, respect for clients' autonomy implies respect for their pursuit of legal claims and demands largely undivided loyalty from their legal advisors. By absolving attorneys from accountability for clients' acts, the traditional advocacy role encourages representation of those most vulnerable to public prejudice and state oppression. The promise of non-judgmental advocacy may also encourage legal consultation by those most in need of ethical counseling. Any alternative system, it is argued, would threaten "rule by an oligarchy of lawyers."<sup>14</sup> To demand that attorneys judge, rather than simply defend, their clients would be "equivalent to saying that saints must have a monopoly of lawsuits" and that the lawyers should have a monopoly of deciding who qualifies for sainthood.<sup>15</sup>

From an ethical standpoint, this justification for neutral partisanship presents two central difficulties. First, it conflates legal and moral entitlements; it assumes that society wishes to permit whatever lawmakers do not prohibit. Yet some conduct that is clearly antithetical to broader public interests may nonetheless remain legal—either because prohibitions appear too difficult or costly to enforce, or because decision makers are too uninformed, overworked, or pressured by special interests. Although lawyers may have no special moral expertise, they at least have a more disinterested perspective than clients on the ethical dimensions of certain practices. Attorneys can accept moral responsibility without necessarily imposing it. Unless the lawyer is the last in town, his or her refusal of the neutral partisan role may simply impose on clients the psychological and financial cost of finding alternative counsel.

A second problem with rights-based justifications for partisanship is that they fail to explain why the rights of clients should trump those of all other parties whose interests are inadequately represented. This failure is most apparent when the client is a well-

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14. Stephen L. Pepper, *The Lawyer's Amoral Ethical Role: A Defense, A Problem, and Some Possibilities*, 1986 AM. B. FOUND. RES. J. 613, 617.

15. This phrase comes from an exchange between Samuel Bowles and David Dudley Field concerning Field's defense of two notorious robber barons. Michael Schudson, *Public, Private, and Professional Lives: The Correspondence of David Dudley Field and Samuel Bowles*, 21 AM. J. LEGAL HIST. 191, 199 (1977).



heeled organization squaring off against an outmatched individual.<sup>16</sup> Particularly where health and safety interests are at issue, partisanship on behalf of corporate profits has often ill-served values of human dignity and autonomy. The Dalkon shield and asbestos litigations offer illustrative case histories of the misery to which unqualified advocacy has contributed.<sup>17</sup> In other less dramatic contexts, where clients view the risks of liability as small in relation to potential gains, zealous representation can readily frustrate regulatory objectives.<sup>18</sup>

Much of the appeal of rights-based justifications for partisanship draws on the lawyer's role in criminal defense proceedings. Yet such proceedings are distinctive in their potential for governmental oppression and in their impact on individual life, liberty, and reputation. For the same reasons that our constitutional traditions impose special protections for criminal cases, most commentators suggest that the justifications for neutral partisanship are strongest in that context.<sup>19</sup> To be sure, in some civil matters, the potential for state action or the constraints on fundamental rights raise concerns analogous to those at issue in criminal proceedings. Yet while zealous advocacy has been of enormous importance in such civil cases, they do not constitute the mainstay of legal work. Only a small portion of the bar is primarily involved either in criminal

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16. Douglas Rosenthal's study of personal injury litigation offers a case in point. As one of the defense lawyers for an insurance company explains:

Frankly, we are in business to wear out plaintiffs . . . . We're not a charity out to protect the plaintiff's welfare. Take the case I was trying today. The other lawyer . . . doesn't know what he's doing. His client's got a good claim for a fractured skull. *I want this bastard to win* . . . and he'll blow it. Today I laid the foundation for contributory negligence, which is very doubtful, and the other lawyer made no attempt to knock it down. The plaintiff is a sweet, gentle guy—a Puerto Rican. I met him in the john at recess and I told him that there was nothing personal in my working against him, that I was just doing my job . . . . It's not my fault, I want him to win. It's his lawyer's fault and his own fault for not getting a better lawyer like me.

DOUGLAS E. ROSENTHAL, *LAWYER AND CLIENT: WHO'S IN CHARGE?* 82-83 (1974).

17. See generally PAUL BRODEUR, *OUTRAGEOUS MISCONDUCT: THE ASBESTOS INDUSTRY ON TRIAL* (1985); SUSAN PERRY & JIM DAWSON, *NIGHTMARE: WOMEN AND THE DALKON SHIELD* 208 (1985).

18. See Robert H. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1, 72 (1988).

19. See DAVID LUBAN, *LAWYERS AND JUSTICE* (1988); Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUM. RTS. 1, 9-10 (1975) (noting that criminal defendants ought to be judged by the jury and not by the defendant's lawyer). But see William H. Simon, *The Ethics of Criminal Defense* 91, MICH. L. REV. 1703 (1993) (criticizing the traditional civil/criminal distinction).

defense or in civil rights, civil liberties, and public interest representation. Professional norms that are appropriate in those cases can hardly serve as the paradigm for all legal practice.

## 2. Confidentiality

A corollary of the neutral partisanship principle is that of confidentiality. Arguments supporting broad protection for client communications track the instrumental and rights-based justifications noted above. By encouraging individuals to seek legal advice and to disclose relevant information, the attorney-client privilege and related ethical rules facilitate compliance with legal norms and appropriate resolution of legal disputes. In addition, an assurance of confidentiality both enables individuals to assert legal rights and preserves specific entitlements such as those concerning privacy, effective assistance of counsel, and protections against self-incrimination.

Yet these arguments, however persuasive in the abstract, fail to justify the current scope of confidentiality protections. In general, bar ethical codes prohibit lawyers from revealing information related to client representation except under certain limited circumstances. Both the Model Code and Model Rules permit lawyers to reveal confidences if required by law or court order and if necessary to collect a fee or to defend themselves from accusations of wrongful conduct.<sup>20</sup> The Code allows a lawyer to reveal "the intention of his client to commit a crime and the information necessary to prevent the crime."<sup>21</sup> The Model Rules permit but do not require lawyers to disclose confidential information "to the extent the lawyer reasonably believes necessary . . . to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm."<sup>22</sup> Some states have modified Code or Model Rule provisions by calling on lawyers to rectify frauds perpetrated during the course of representation or to disclose life-threatening conduct.<sup>23</sup> In most jurisdictions, however, past crimes, torts, and non-criminal but life-threatening acts must remain confidential.

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20. MODEL CODE DR 4-101(C)(2), (4); MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 & cmt. (1983).

21. MODEL CODE DR 4-101(C)(3) (footnote omitted).

22. MODEL RULES Rule 1.6.

23. See ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT 104-10 (1993) [hereinafter ABA/BNA MANUAL] (listing each state's version of the clause).

It is by no means obvious that such sweeping mandates are essential for adequate legal representation. Current rules have exceptions and indeterminacies that few clients comprehend; existing research leaves doubt that adding certain further qualifications would significantly alter client behavior.<sup>24</sup> Moreover, whatever the rules, many individuals will be unwilling to trust their lawyers with compromising disclosures.<sup>25</sup> In those cases, attorneys will often find independent sources for information, such as documentary evidence, corroboration by other witnesses, and so forth. Historical, cross-cultural, and cross-professional research makes clear that practitioners have long provided counseling on confidential matters without the sweeping protections from disclosure that the American bar has now obtained.<sup>26</sup>

Although the costs of such protections are difficult to quantify, some indications emerge from reported cases, bar committee opinions, and survey data. Many innocent investors have suffered substantial losses as a result of attorneys' failure to disclose client fraud.<sup>27</sup> The recent savings and loan debacles offer multiple examples; as experts have noted, many of those disasters would not have occurred without the assistance of lawyers, who provided little or no resistance to abusive activity.<sup>28</sup>

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24. See DEBORAH L. RHODE & DAVID LUBAN, *LEGAL ETHICS* 224-53 (1992), and sources cited therein; Vincent C. Alexander, *The Corporate Attorney Client Privilege: A Study of the Participants*, 63 ST. JOHN'S L. REV. 191 (1989); Fred C. Zacharias, *Rethinking Confidentiality*, 74 IOWA L. REV. 351, 382-83 (1989) (finding that clients are unaware of confidentiality rules); *Corporate Legal Ethics—An Empirical Study: The Model Rules, The Code of Professional Responsibility, and Counsel's Continuing Struggle Between Theory and Practice*, 8 J. CORP. L. 601 (1983). For a review of these studies and a critique of current confidentiality rules in the corporate context, see Elizabeth G. Thornburg, *Sanctifying Secrecy: The Mythology of the Corporate Attorney-Client Privilege*, 69 NOTRE DAME L. REV. 157 (1993).

25. See generally JONATHAN D. CASPER, *AMERICAN CRIMINAL JUSTICE: THE DEFENDANT'S PERSPECTIVE* (1972); Harry I. Subin, *The Lawyer as Superego: Disclosure of Client Confidences to Prevent Harm*, 70 IOWA L. REV. 1091, 1164 (1985) (and sources cited therein).

26. Rhode, *supra* note 5, at 614.

27. See Report of the Trustee Concerning Fraud and Other Misconduct in the Management of the Debtor, discussed in *In re O.P.M. Leasing Serv.*, 61 B.R. 596, 597 (S.D.N.Y. 1986) ("massive lease fraud exceeding \$100 million"); Stuart Taylor Jr., *Ethics and the Law: A Case History*, N.Y. TIMES, Jan. 9, 1983, § 6 (Magazine), at 30, 31 (attorneys knew of \$60 million in fraudulent loans); see also *Schatz v. Rosenberg*, 943 F.2d 485 (4th Cir. 1991) (holding that a law firm had no duty to disclose client information to third party investor), *cert. denied*, 112 S. Ct. 1475 (1992).

28. *Lincoln Savings & Loan Ass'n v. Wall*, 743 F. Supp. 901 (D.D.C. 1990); Susan Schmidt, Panel: "Where Were the Lawyers During the S&L Crisis?", WASH. POST, Mar.

Nor has the price of broad confidentiality protections been only financial. In some jurisdictions, attorneys have persuaded courts and bar ethics committees not to require disclosure of child abuse or kidnapping plans in contested custody cases.<sup>29</sup> Even where identifiable individuals' lives have been at risk, many lawyers have felt that their confidentiality obligations trumped competing concerns. In one well-known Minnesota case, lawyers for an insurance company failed to reveal that their doctor had discovered a dangerous heart condition that plaintiffs' own medical experts had failed to discover.<sup>30</sup>

Such cases suggest the extent to which bar ethical rules have lost touch with ordinary moral intuitions. In one of the few empirical studies on point, clients were much more likely than lawyers to believe that disclosure was, or should be, required to protect third parties, and that such requirements would not discourage consultation with attorneys.<sup>31</sup> This divergence between public and professional views has also been apparent in bar debates over appropriate confidentiality mandates. Concerns about lawyers' civil liability dominated discussion of the proposed Model Rules. Notably absent from the dialogue was any justification for provisions allowing disclosures to protect lawyers' own financial interests but not to preserve other individuals' health, safety, or economic security.<sup>32</sup>

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23, 1991, at B1 (quoting Harris Weinstein). For a discussion of lawyers' conduct in behalf of savings and loan institutions and the need for regulatory responses, see generally Susan Koniak, *When Courts Refuse to Frame the Law and Others Frame It to Their Will*, 66 S. CAL. L. REV. 1075 (1993); David Wilkins, *Making Context Count: Regulating Lawyers After Kaye, Scholer*, 66 S. CAL. L. REV. 1145 (1993).

29. Cal. Comm. on Professional Ethics, Formal Op. 1976-37, cited in RHODE & LUBAN *supra* note 24, at 241 n.3. But see *Dike v. Dike*, 448 P.2d 490, 497-98 (Wash. 1968) (stating that an attorney whose client kidnapped her own child must divulge the client's address).

30. *Spaulding v. Zimmerman*, 116 N.W.2d 704 (Minn. 1962). Nor is this an isolated case. For example, some asbestos company lawyers were clearly aware of the company's nondisclosure of life-threatening conditions for employees. Saul W. Gellerman, *Why "Good" Managers Make Bad Ethical Choices*, in ETHICS IN PRACTICE: MANAGING THE MORAL CORPORATION 18, 19 (Kenneth R. Andrews & Donald K. David eds., 1989) [hereinafter ETHICS IN PRACTICE].

31. Zacharias, *supra* note 24, at 392-95.

32. See Robert J. Kutak, ABA Comm'n on Evaluation of Professional Standards, Report to the House of Delegates (June 30, 1982), in 1 ABA MATERIALS ON MODEL RULES OF PROFESSIONAL CONDUCT ITEM 400, at 4 (1982) (noting that the confidentiality exception for lawyer-client disputes met with "almost universal agreement"), discussed in Rhode, *supra* note 5, at 615 n.96. See generally Theodore Schneyer, *Professionalism as Politics: The Making of a Modern Legal Ethics Code*, in LAWYERS' IDEALS/LAWYERS' PRACTICES: TRANSFORMATIONS IN THE AMERICAN LEGAL PROFESSION (Robert L. Nelson et al. eds.,

Such provisions highlight more general problems with a regulatory process under exclusive control of the group to be regulated.

### B. Undervaluing Client Interests

While clients' interests are overvalued in comparison with broader societal interests, they are undervalued in comparison with the profession's own interests. Inadequate representation often occurs where clients lack sufficient information, financial resources, or bargaining leverage, or where attorneys' perceived relationships with other individuals are more critical than client satisfaction. Unlike the overvaluation of client concerns described above, underrepresentation is generally inconsistent with the profession's stated values. Problems typically arise because those values are not adequately specified or enforced under existing regulatory structures.

#### 1. Resource Limitations

Underrepresentation is most chronic where neither the client nor a third party who is subsidizing legal services has sufficient resources for adequate assistance. In criminal proceedings, the problem is pervasive. About two-thirds of felony defendants meet prevailing definitions of indigency and qualify for appointed counsel. Most jurisdictions appoint private lawyers to provide representation under one of two systems: case-by-case assignments or a competitive contract program in which attorneys bid to provide representation for an annual fee, irrespective of the volume or complexity of caseloads. Under either of these systems, fee awards are quite low; limits of \$500 or \$1000 are common for felony cases and hourly reimbursements are well under prevailing market rates.<sup>33</sup> Some state and federal courts require all admitted attorneys to accept criminal cases despite most practitioners' lack of expertise and the inadequacy of training and support structures.<sup>34</sup> About a third of all jurisdictions have public defender services, which are almost universally understaffed and underfunded; case-

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1992) [hereinafter *LAWYERS' IDEALS*] (discussing the development of the Model Rules).

33. ROBERT L. SPANGENBERG & PATRICIA A. SMITH, AMERICAN BAR ASSOCIATION, AN INTRODUCTION TO INDIGENT DEFENSE SYSTEMS 6-9 (tabulating that 12 states have maximums of \$1000 or less) (1986).

34. Albert L. Vreeland, II, Note, *The Breath of the Unfee'd Lawyer: Statutory Fee Limitations and Ineffective Assistance of Counsel in Capital Litigation*, 90 MICH. L. REV. 626, 627 (1991); see also Marcia Coyle et al., *Fatal Defense*, NAT'L L.J., June 11, 1990, at 30, 32 (noting inadequacies in the states' methods of selecting counsel).

loads frequently approach 200 felony or 500 misdemeanor cases per year per attorney.<sup>35</sup> Most individuals who do not qualify for appointed counsel are just over the line of indigency. They rely largely on a small number of attorneys who specialize in handling high volumes of criminal cases, usually for flat fees, payable in advance.<sup>36</sup>

As a recent report on indigent representation in federal courts noted, many criminal defense lawyers "face an inherent conflict between remaining financially solvent and . . . [providing] vigorous advocacy."<sup>37</sup> For the vast majority of cases, attorneys face intense pressures to negotiate plea bargains after little if any work. Privately retained lawyers who use flat fees, court-appointed attorneys who work at inadequate reimbursement rates, and public defenders with burgeoning caseloads seldom have any interest in going to trial. A complex case that does not settle can be disastrous. A quick plea also spares practitioners the risks and pressures of trials and preserves good working relationships with other participants in the system.

Neither market nor regulatory mechanisms provide adequate checks on such abuses. Bar disciplinary agencies and court appointment systems do not actively monitor performance.<sup>38</sup> Nor do clients typically have sufficient information to second-guess a lawyer's plea recommendations. Rarely do they have access to knowledge about prosecutorial, juror, and judicial behavior in comparable cases.<sup>39</sup> Even if clients doubt the adequacy of their representation, they generally cannot do much about it. Indigent defendants have no right to select their attorneys, and court-appointed counsel do not depend for their livelihood on the satisfaction of clients. Non-indigent defendants who have paid a flat fee in advance to private counsel often cannot afford to hire another lawyer. Malpractice remedies are also inadequate; convicted criminals rarely

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35. JEROLD H. ISRAEL ET AL., *CRIMINAL PROCEDURE AND THE CONSTITUTION* 25 (1991).

36. Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101 YALE L.J. 1979, 1988 (1992) (noting that most attorneys insist on being paid a flat fee up front).

37. Report of the Comm. to Review the Criminal Justice Act (Jan. 29, 1993), reprinted in 52 CRIM. LAW REP. 2265, 2284-85 (March 10, 1993) [hereinafter Report].

38. For a discussion of the inadequacy of review, see *id.* and RHODE & LUBAN, *supra* note 24, at 938-41.

39. See Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1959 (1992); Schulhofer, *supra* note 36, at 1991 (noting difficulties in monitoring counsel's loyalty and performance in plea negotiations).

make sympathetic plaintiffs, and problems of proving causation and damages are generally insurmountable.<sup>40</sup> "Mere" negligence does not trigger bar disciplinary action, and only the most egregious lawyering will lead courts to find ineffective assistance of counsel.<sup>41</sup>

Related problems arise in civil contexts where client resources or financial stakes are too limited to underwrite fully adequate representation.<sup>42</sup> As subsequent discussion indicates, the bar has sometimes exacerbated the difficulties by blocking efforts to reduce costs. In other settings, problems of underrepresentation arise from inherent conflicts of interest. For example, in contingent fee cases, attorneys' economic interest lies in maximizing the return on their work; clients' interest lies in gaining the highest possible settlement. Depending on the amount of effort and expense lawyers have invested in preparation, the alternative uses of their time, and their degree of risk averseness, they may be more or less disposed to settle than their clients.<sup>43</sup>

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40. In some jurisdictions, a defendant cannot bring a malpractice action unless and until the conviction has been set aside. *E.g.*, *Shaw v. Alaska*, 816 P.2d 1358 (Alaska 1991). In others, the defendant must prove innocence. *E.g.*, *Glenn v. Aiken*, 569 N.E.2d 783 (Mass. 1991).

41. See Gary Goodpaster, *The Adversary System, Advocacy, and Effective Assistance of Counsel in Criminal Cases*, 14 N.Y.U. REV. L. & SOC. CHANGE 59, 80 (1986) (noting that failing to investigate is not ineffective assistance); Stephen J. Schulhofer, *Effective Assistance on the Assembly Line*, 14 N.Y.U. REV. L. & SOC. CHANGE 137, 139 (1986) (discussing difficulties of proving incompetence).

42. City of N.Y. Dep't of Consumer Affairs, *WOMEN IN DIVORCE: LAWYERS, ETHICS, FEES & FAIRNESS* 9-10, 18-20 (1992); *Family Law Task Force Says, "Make Pro Se Easier,"* WASH. LAW., Sept./Oct. 1992, at 12, 12 (reporting a finding by the District of Columbia Task Force on Family Law Representation of "an enormous unmet need for legal assistance to a severely under-served population").

43. See ROSENTHAL, *supra* note 16 at 95-116 (discussing differences in settlement and going to trial for attorneys and clients); Kevin M. Clermont & John D. Currihan, *Improving on the Contingent Fee*, 63 CORNELL L. REV. 529, 534-78 (1978) (evaluating conflicts of interest in contingent fee cases); John C. Coffee, Jr., *Rescuing the Private Attorney General: Why the Model of The Lawyer as Bounty Hunter is Not Working*, 42 MD. L. REV. 215, 230-36 (1983) (discussing competing interests in class-actions and derivative suits); Geoffrey P. Miller, *Some Agency Problems in Settlement*, 16 J. LEGAL STUD. 189, 198-202 (1987) (describing contingent fee conflicts); see also Herbert M. Kritzer et al., *The Impact of Fee Arrangement on Lawyer Effort*, 19 LAW & SOC'Y REV. 251, 271-72 (1985) (discussing empirical findings that lawyers working for contingent fees were somewhat more sensitive to the productivity of their time and somewhat less sensitive to client goals than hourly fee attorneys, but noting that differences were not as great as theoretical work often implied; professional standards also appeared important).

## 2. Lawyer-Client Relationships: Information Constraints and Bargaining Leverage

In cases where client resources are less constrained and lawyers are working for hourly fees, a converse set of problems arises. Undervaluing clients' interests leads to overpreparing their cases; meter running is a practice that lawyers frequently observe and, in some confidential surveys, acknowledge committing.<sup>44</sup> Here, adversarial psychology and performance anxieties reinforce financial pressures. Lawyers will often prefer to leave no stone unturned, provided, of course, that they can charge by the stone.<sup>45</sup> A related and reportedly widespread problem involves charging excessive fees because of unfamiliarity in the area, without disclosing that unusual preparation was required.<sup>46</sup> Finally, some qualitative research suggests that lawyers' "creative billing" practices are often fraudulent or on the fringes of fraud: inflating hours, charging two clients for the same work or the same travel time, failing to describe the basis of bills, and so forth.<sup>47</sup> Although sophisticated corporate clients

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44. Lisa G. Lerman, *Lying to Clients*, 138 U. PA. L. REV. 659, 705-09 (1990); William G. Ross, *The Ethics of Hourly Billing by Attorneys*, 44 RUTGERS L. REV. 1, 3, 15 (1991); see also Wayne D. Brazil, *Civil Discovery: Lawyers' Views of Its Effectiveness, Its Principal Problems and Abuses*, 1980 AM. B. FOUND. RES. J. 787 (examining the costs of discovery); Paul Gaynor & Wendy R. Leibowitz, *An Empirical Study of Lawyers' Billing Practices* (1990) (unpublished manuscript, on file with author) (noting that one-quarter of lawyers in a national survey of 470 attorneys reported billing more hours than they actually worked and one-half denied padding themselves but believed that other lawyers engaged in such conduct); *infra* note 47.

45. Rhode, *supra* note 5, at 635.

46. See Leonard Gross, *Ethical Problems of Law Firm Associates*, 26 WM. & MARY L. REV. 259, 302 n.185, 307 n.201 (1985) (noting that 89% of surveyed Illinois lawyers felt that they had lacked sufficient expertise to handle a matter, and only about one-third of associates frequently or often reduced the amount of time billed to a client because of lack of productivity).

47. Edward A. Adams & Thom Weidlich, *Talk Ain't Cheap*, NAT'L. L.J., Nov. 16, 1992, at 2, 48 (reporting that 88% of partners surveyed said they bill for social conversations if the client initiates them on a regular basis but that 96% of corporate executives indicated that they do not expect to be billed for such conversations). In Lerman's small study, virtually all of the surveyed lawyers reported deceptive billing practices. Lerman, *supra* note 44, at 705-20. In Ross's larger survey, over one-half of corporate counsel and private practitioners personally knew of some instances of padding, and over one-third believed that lawyers occasionally engaged in such practices. Ross, *supra* note 44, at 16; see also Jonathan L. Kirsch, *'How Do I Bill This': Subtle and Not-so-subtle Pressures Keep Associates Chasing Billable Hours*, CAL. LAW., Apr. 1985, at 15, 17 (citing one practitioner's view that "[f]illing out timesheets is the most creative task" of many of the partners and associates with whom he was acquainted); Jeff S. Olson, *Truth in Billing*, 69 A.B.A. J. 1344 (1983) (suggesting inflated hours are used to compensate for unrealistically low hourly rates). For a discussion of the ethical problems posed by common fee practice-



have become more adept at identifying such practices and have the leverage or expertise to avoid it,<sup>48</sup> other individuals, particularly one-shot purchasers, are vulnerable to abuse.

These individuals often lack sufficient information to assess the quality, competence, or cost-effectiveness of their representation. In an era of increasing specialization where lawyers know more and more about less and less,<sup>49</sup> practitioners who do not routinely deliver particular services may have difficulty doing so efficiently. Yet bar ethical codes do not speak to this problem; they demand only skills "adequate" or "reasonably necessary" for representation.<sup>50</sup> Nor have courts and disciplinary agencies been inclined to monitor the fairness of fee agreements except in cases of clear abuse.<sup>51</sup>

Related problems arise where formal mechanisms of client accountability are weak and where inequalities of class, race, ethnicity, or gender reinforce professional dominance. So, for example, lawyers representing diffuse classes in public interest cases, or establishing priorities for scarce resources in legal service organizations, may lack incentives to remain adequately sensitive to client concerns.<sup>52</sup> In other contexts, attorneys who have received little

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es such as billing multiple clients for the same hours, see ABA Standing Comm. on Professional Ethics, Formal Op. 93-379 (Dec. 6, 1993).

48. See Nancy Rutter, *The Law Business*, CAL. LAW., May 1991, at 26; Shawn Tully, *How to Cut those \$\$\$\* Legal Costs*, FORTUNE, Sept. 21, 1992, at 119, 19-20.

49. Roger C. Cramton, *Delivery of Legal Services to Ordinary Americans*, 44 CASE W. RES. L. REV. 531, 608 (1994).

50. The Model Code requires "preparation adequate in the circumstances." MODEL CODE DR 6-101(A)(2). The Model Rules require "knowledge, skill, thoroughness and preparation reasonably necessary for the representation" MODEL RULES Rule 1.1.

51. Under the Model Code, the test is whether a lawyer "of ordinary prudence" would consider the fee excessive. MODEL CODE DR 2-106(B). Under the Model Rules, the test is whether the fee is "reasonable" MODEL RULES Rule 1.5a. Courts and disciplinary agencies have been reluctant to police fees under either of these standards. See RHODE & LUBAN, *supra* note 24, at 753-66; CHARLES W. WOLFRAM, *MODERN LEGAL ETHICS* 516 (1986); see generally Lester Brickman, *Attorney Client Fee Arbitration: A Dissenting View*, 1990 UTAH L. REV. 277 (discussing the problems and merits of fee dispute arbitration).

52. For examples in legal services, see DOUGLAS J. BESHAROV, *LEGAL SERVICES FOR THE POOR: TIME FOR REFORM* xiv-xvi (1990); Marshall J. Breger, *Legal Aid for the Poor: A Conceptual Analysis*, 60 N.C. L. REV. 282 (1982); Cramton, *supra* note 49. For illustrations in public interest contexts, see Derek A. Bell Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 (1976); Deborah L. Rhode, *Class Conflicts in Class Actions*, 34 STAN. L. REV. 1183 (1982). For other examples, see John Leubsdorf, *Pluralizing the Client-Lawyer Relationship*, 77 CORNELL L. REV. 825 (1992).

formal training in interpersonal skills end up talking past the concerns that are most central to the client. Studies of matrimonial practice reveal participants occupied with "two different divorces" lawyers with the financial and legal consequences of separation and clients with the social and emotional ones.<sup>53</sup> Divorcing parties are often depressed, anxious, and unsure of what they want. Attorneys are often impatient, insensitive, and unresponsive in dealing with matters lacking direct legal relevance. Lawyers and clients are like opera performers and their bored but dutiful audiences; lawyers will not "interrupt the aria but [they will] not applaud much either for fear of an encore."<sup>54</sup>

Other, more general research reveals a similar mismatch between professional and public concerns. Clients place highest value on lawyers' responsiveness to their needs as measured by "attentiveness, capacity and willingness to communicate, and respect for [their] intelligence and judgment."<sup>55</sup> These considerations do not receive comparable priority in professional education and regulatory structures.<sup>56</sup>

### 3. Collegial Relationships

Inadequate representation of client interests is also common where lawyers place priority on maintaining good relationships with other members of their community or participants in the legal process. If zealous pursuit of any single matter will antagonize individuals whose continuing cooperation or client referrals is important, attorneys may adjust their partisanship accordingly. For example, lawyers in surveyed consumer protection cases have often accommodated business opponents' concerns rather than maximized client objectives.<sup>57</sup> Practitioners in small towns have similarly reported foregoing strategies that would generate ill will among opposing lawyers and established interests.<sup>58</sup> Criminal defense attor-

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53. Austin Sarat & William L.F. Felstiner, *Law and Social Relations: Vocabularies of Motive in Lawyer/Client Interaction*, 22 LAW & SOC'Y REV. 737, 766 (1988).

54. *Id.* at 750.

55. Barbara A. Curran, *Surveying the Legal Needs of the Public? What the Public Wants and Expects in the Lawyer-Client Relationship*, in LAW IN A CYNICAL SOCIETY: OPINION AND LAW IN THE 1980'S 107, 104 (Dale Gibson & Jane K. Baldwin eds., 1985).

56. For the disciplinary system's inattentiveness to such matters, see ABA COMMISSION ON EVALUATION OF DISCIPLINARY ENFORCEMENT, REPORT TO THE HOUSE OF DELEGATES (1991) [hereinafter ABA REPORT]; Susan R. Martyn, *Lawyer Competence and Lawyer Discipline: Beyond the Bar?*, 69 GEO. L.J. 705 (1981).

57. Stewart Macaulay, *Lawyers and Consumer Protection Laws*, 14 LAW & SOC'Y REV. 115, 136-41 (1979).

58. DONALD D. LANDON, COUNTRY LAWYERS: THE IMPACT OF CONTEXT ON PROFES-

neys have sometimes found that retaining the good will of prosecutors and trial judges is more important than securing the best outcome for a particular client.<sup>59</sup> There are, to be sure, limits on how far a lawyer can compromise fiduciary obligations and still maintain collegial respect. But there are also limits on what attorneys can do without jeopardizing their own workplace relationships and referral networks.

### C. *Nonrepresentation of Potential Client Interests*

A final set of problems involves the lack of representation for a vast array of legal needs. Although methods for assessing such needs are inherently inexact, contemporary surveys give some sense of the general dimensions of the problem. About half the time lawyers devote to individual clients serves those with incomes in the top 15% the population; only 10% of attorneys' time goes to those in the bottom third.<sup>60</sup> By their own account, government-funded legal aid programs can handle only a small fraction of the needs of those eligible for assistance, and many other individuals of limited means cannot realistically afford such services.<sup>61</sup> Studies of low-income households generally indicate that between 50-80% of their perceived legal problems remain unaddressed.<sup>62</sup> A national study cutting across income groups found that individuals do not seek lawyers' help for between 30-40% of their personal legal needs.<sup>63</sup>

There are, moreover, a wide range of unrepresented interests beyond those reflected in such studies. Surveys relying on self-reports exclude matters that individuals fail to identify as needs

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SIONAL PRACTICE 136-42 (1990); Donald D. Landon, *Clients, Colleagues, and Community: The Shaping of Zealous Advocacy in Country Law Practice*, 1985 AM. B. FOUND. RES. J. 81, 105-09; Austin Sarat, *Ideologies of Professionalism: Conflict and Change Among Small Town Lawyers* (Aug. 7, 1990) (unpublished manuscript, on file with author).

59. Albert W. Alschuler, *Personal Failure, Institutional Failure, and the Sixth Amendment*, 14 N.Y.U. REV. L. & SOC. CHANGE 149, 151-52 (1986); cf. Schulhofer, *supra* note 36, at 1989-90 (noting that court officials who appoint for indigent clients favor cooperative lawyers).

60. Joel Handler et al., *Lawyers and the Pursuit of Legal Rights* 101-02 (1978); see also Barbara Curran, *1989 Survey of the Public's Use of Legal Services* 81-89 (May 1989).

61. At current governmental funding levels, legal aid programs receive less than \$10 for every person below the poverty line. RHODE & LUBAN, *supra* note 24, at 823.

62. *The Spangenberg Group, National Survey of the Civil Legal Needs of the Poor* 3 (1989); *Illinois Legal Needs Study* 2 (Oct. 6, 1989).

63. Curran, *supra* note 60, at 81.

due to unawareness of legal rights and remedies. Also omitted are many collective interests involving product safety, environmental protection, civil rights, and so forth. Given the extremely limited resources available to public interest organizations, these concerns remain chronically underrepresented.<sup>64</sup> Finally, legal needs studies typically leave out third party concerns, such as those of children in divorce cases, whose welfare is implicated but generally not represented in legal proceedings.

Although delivery of legal services is not the focus of this Essay, neither can any adequate discussion of legal ethics fail to acknowledge certain central distributional issues. First, in a society at least in principle committed to equal justice under the law, the absence of adequate representation poses obvious dilemmas for lawyers in adversarial contexts. Second, the bar has itself compounded problems of inadequate assistance by invoking ethical concerns when resisting lay competition and procedural reforms. Such resistance has blocked changes that would minimize the need for lawyers in areas such as uncontested divorce, probate, immigration, residential real estate, and auto liability claims.<sup>65</sup>

Finally, and most importantly, the bar collectively has been unable or unwilling to grapple with the full implications of these distributional issues. The ABA consistently has rejected proposals for mandatory pro bono service, and the vast majority of lawyers make no contributions to organized legal aid programs.<sup>66</sup> Within some segments of the bar, a large part of the problem lies in the refusal to acknowledge that a significant problem exists. During the debates over a rejected Model Rules provision requiring pro bono assistance, opponents offered extensive variations on one

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64. In 1989, the Council for Public Interest Law identified 200 tax-exempt, nonprofit groups that awarded a substantial portion of their resources to the representation of previously unrepresented clients on matters of public policy. These groups employed about 1000 lawyers, less than 1% of the United States Bar. Nan Aron, *Liberty and Justice for All: Public Interest Law in the 1980s and Beyond* 55-56 (1989).

65. See Deborah L. Rhode, *The Delivery of Legal Services by Non-Lawyers*, 4 GEO. J. LEGAL ETHICS 209 (1990).

66. According to the most comprehensive data available, only 17% of American lawyers participate in organized pro bono programs for the poor. See ABA Consortium on Legal Services and the Public, *The 1989 Directory of Private Bar Involvement Programs* 182-83 (1989). Most of lawyers' pro bono work is designed to accommodate existing or potential clients or to foster lawyers' reputation and collegial relationships through bar organizations. For a discussion of the bar's contributions and defeated Model Rules provisions, see RHODE & LUBAN, *supra* note 24, at 872-73; Roger Cramton, *Mandatory Pro Bono*, 19 HOFSTRA L. REV. 1113, 1121-24 (1991).

commentator's theme: "I know of no person or worthy cause that has been refused legal service in [this county], regardless of the ability to pay . . . I have no reason to believe the same is not true of every other county of our state."<sup>67</sup>

Moreover, even lawyers who acknowledge the problem of inadequate access typically ignore its connection to related issues of professional role. For example, in debates over another unsuccessful Model Rule proposal that would have required lawyers to avoid exploiting the ignorance of unrepresented opponents, commentators frequently expressed unwillingness to "coddle[e]" those "too cheap to hire an attorney."<sup>68</sup> In the face of massive distributional inequalities, bar leaders typically have proposed only minor reforms, such as modest increases in voluntary pro bono contributions, legal services' subsidies, and nonlawyer services.<sup>69</sup>

#### D. *The Problem with the Problem*

These critiques of professional norms have generated a corresponding body of criticisms, which inform the evaluation of possible responses set forth below. However, before addressing particular initiatives, several overarching observations are in order.

Claims about over- and undervaluing client interests typically rest on an unexpressed and unexplored standard of appropriate professional representation. Yet consensus on that standard exists only at the abstract level. As the following discussion suggests, the bar collectively has no shared understanding of what constitutes undue partisanship or ineffective assistance except in relatively egregious cases. In a professional context where either too much or too little client loyalty can result in ethical violations, it is often

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67. Rhode, *supra* note 5, at 609 (quoting Stunz and discussing bar opposition to mandatory pro bono services).

68. *Id.* at 611 (quoting Parsons).

69. Compare MODEL RULES Rule 3.6 (Discussion Draft 1980) (a defeated rule which prohibited lawyers from "unfairly exploiting [an unrepresented party's] ignorance of the law or the practices of the tribunal") with MODEL RULES Rule 4.3 (1993) (requiring that lawyers avoid implying to unrepresented parties that they are disinterested and that they should make reasonable efforts to correct evident misunderstandings concerning their role). For example, in 1993, the ABA House of Delegates resolved that lawyers increase their voluntary pro bono efforts from 40 to 50 hours a year and devote the majority of their efforts to the poor. In 1986, the ABA Commission on Professionalism concluded that "limited licensing of paralegals to perform certain functions seems to be a desirable step," and singled out real estate and telephone hotlines as possible areas for reform. ABA Comm'n on Professionalism, ". . . In the Spirit of Public Service": A Blueprint for the Rekindling of Lawyer Professionalism, 112 F.R.D. 243, 301 (1986).

difficult to combat one dynamic without reinforcing the other.

Problems in addressing these issues are complicated by several factors. First, many ethical concerns are inextricably linked to distributional issues and to limitations in resources available to clients, opponents, or third parties. It is, however, by no means clear what follows from that fact. Our nation's rhetorical commitment to equal justice under the law is the kind of unexamined platitude that prompted Tawney's observation about equal opportunity. He wondered what would "horrify proponents most: the denial of the principle or the attempt to apply it?"<sup>70</sup> Given the elasticity of legal needs and the disparity of financial resources among the public generally, equalizing access is an unrealistic aspiration. It would require not only massive government subsidies, but also the prohibition of private markets.<sup>71</sup>

Yet once we acknowledge such inequality, some uncomfortable questions persist. What constitutes a fair contest in an adversarial structure? At what point does exploitation of resource advantages become ethically problematic? To what extent do definitions of competent assistance depend on ability and inclination to pay? How much claiming and blaming do we as a society wish to subsidize? Even modest calls to enhance, if not equalize, access leave most of these sticky points unaddressed. If we cannot reach agreement on such distributional issues at the societal level, it is unrealistic to expect consensus within a highly heterogeneous bar serving clientele of widely varying means.

A final complicating factor is that various psychological tendencies work against professionals' recognition of ethical problems. One such tendency is "cognitive conservatism." Individuals are more likely to register and retain information that is compatible with established beliefs or earlier decisions.<sup>72</sup> A related phenomenon is reduction of "cognitive dissonance." After making a decision, individuals tend to suppress or reconstrue information that

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70. ROBERT TAWNEY, *EQUATELY* 103 (1964).

71. Deborah L. Rhode, *The Rhetoric of Professional Reform*, 45 MD. L. REV. 274, 281-83 (1986).

72. See ELLIOT ARONSON, *THE SOCIAL ANIMAL* 148 (6th ed. 1992); SUSAN T. FISKE & SHELLEY E. TAYLOR, *SOCIAL COGNITION* 149-51 (1st ed. 1984); RICHARD NISBETT & LEE ROSS, *HUMAN INFERENCE: STRATEGIES AND SHORTCOMINGS OF SOCIAL JUDGMENT* 167 (1981); Craig A. Anderson et al., *Perseverance of Social Theories: The Role of Explanation in the Persistence of Discredited Information*, 39 J. PERSONALITY & SOC. PSYCHOL. 1037 (1980); Donald C. Langevoort, *Where Were the Lawyers? A Behavioral Inquiry into Lawyers' Responsibility for Clients' Fraud*, 46 VAND. L. REV. 76, 97-104 (1993).

casts doubt on that decision.<sup>73</sup> Accordingly, once lawyers have determined to represent a particular client, they may become less sensitive to ethical problems arising from that choice.<sup>74</sup>

Other cognitive processes push in similar directions. Individuals are more likely to retain information that reflects favorably on themselves and to form positive impressions of someone on whom their own success partly depends.<sup>75</sup> So too, the very act of advocating a particular position increases the likelihood that proponents will themselves come to adopt that position.<sup>76</sup> In many practice settings, these cognitive biases, together with financial self-interest, collegial pressure, and diffusion of responsibility inevitably skew ethical judgment. Such distortions can affect lawyers' sense of collective as well as personal responsibility. The more closely that individuals identify with their professional role, the less sensitive they may become to problems in its normative foundations or practical consequences.

This insensitivity is exacerbated by common human tendencies to explain ethical misconduct in terms of individual deviance rather than institutional constraints.<sup>77</sup> It is easier to attribute problems of professionalism to occasional lapses by aberrant practitioners than to acknowledge failures in market structures and regulatory design. Yet as the following discussion suggests, it is precisely those failures that require our attention if we are seriously committed to institutionalizing ethics.

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73. See LEON FESSTINGER, A THEORY OF COGNITIVE DISSONANCE 128-34 (1957); ARONSON, *supra* note 72, at 202-03; Langevoort, *supra* note 72, at 103 n.113.

74. For a comprehensive overview of this problem, see Langevoort, *supra* note 72.

75. For an analysis of biases toward retaining information that makes us "feel good," see THOMAS GILOVICH, HOW WE KNOW WHAT ISN'T SO: THE FALLIBILITY OF REASON IN EVERYDAY LIFE 86 (1991); Robert P. Abelson, *Beliefs Are Like Possessions*, 16 J. THEORY OF SOC. BEHAV., 223 (1986). See generally Jonathan Macy, *Civic Education and Interest Group Formation in the American Law School*, 45 STAN. L. REV. 1937 (1993). For a discussion of biases in situations of dependency, see Ziva Kunda, *The Case for Motivated Reasoning*, 108 PSYCHOL. BULL. 480, 486-87 (1990) (exploring how motivation may affect reasoning); Steven L. Neuberg & Susan T. Fiske, *Motivational Influences on Impression Formation: Outcome Dependency, Accuracy-Driven Attention, and Individuating Processes*, 53 J. PERSONALITY & SOC. PSYCH. 431 (1987).

76. Ellen T. Klaus, *Psychological Effects of Immoral Actions: The Experimental Evidence*, 85 PSYCHOL. BULL. 756, 762-64 (1978); Macy, *supra* note 75.

77. NISBETT & ROSS, *supra* note 72, at 3-4, 204; KELLY G. SHAVER, THE ATTRIBUTION OF BLAME: CAUSALITY, RESPONSIBILITY, AND BLAMEWORTHINESS 132-34 (1985); MELVIN LERNER, THE BELIEF IN A JUST WORLD 20-22, 118-22 (1980).

## II. REGULATORY STRUCTURES

Most problems of professionalism call for changes in bar ethical codes and enforcement structures. The significance of such changes should neither be overstated nor undervalued. Revising formal standards will not of itself recast legal practice; much depends on their level of specificity, the balance they strike between professional and societal interests, and the effectiveness of sanctions. Moreover, ensuring adequate enforcement presents considerable structural difficulties. Some are inherent in any professional oversight system. Misconduct is often difficult to detect, prove, and remedy; the costs of monitoring may be prohibitive; and the same forces that create the need for regulatory oversight often undermine its effectiveness. Yet other problems in bar regulation are more political than structural. These reflect professional dominance over the codification and enforcement process.

Unlike governance structures in other nations and professions, regulation of the American bar has remained under almost exclusive control of the group to be regulated. Courts in this country have asserted inherent authority to oversee the practice of law, and generally have permitted legislative initiatives only if consistent with judicial standards.<sup>78</sup> The Committee that drafted the Code of Professional Responsibility included no lay members; the 13-member Model Rules Commission had only one.<sup>79</sup> Nor were any lay perspectives included on the bodies adopting those codes—the American Bar Association's House of Delegates and state supreme courts.

Interpretation and enforcement of professional rules similarly remain under professional control. Nonlawyers generally have obtained only token representation on disciplinary bodies and lawyers have controlled the selection process. Few of these lay representatives have had the backgrounds, resources, or sense of accountability to consumers that would create a significant counterweight to professional power. Nonlawyer members who lack independent sources of information or ties to organized interest groups have difficulty maintaining the "[external] viewpoint they are supposed to bring."<sup>80</sup>

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78. CHARLES W. WOLFRAM, *MODERN LEGAL ETHICS* 21-25 (1986) (providing an overview of regulation of attorneys).

79. RHODE & LUBAN, *supra* note 24, at 128. By contrast, the British Royal Commission on Legal Services had a majority of nonlawyers. *Id.*

80. Sylvia Ostrey, *Competition Policy and the Self-Regulating Professions*, in THE



The point is not to question the good faith of the attorneys and judges who control bar regulatory processes. Without doubt, most members of the profession are committed to improving the system in which they work. What is open to doubt is whether the bar as a whole can rise above self-interest on issues that place its income or status at risk. Pure altruism may be possible, but the architects of our regulatory processes generally have proceeded on a contrary assumption. As earlier discussion suggested, simply through normal processes of dissonance reduction and acculturation, professionals may lose sensitivity to interests at odds with their own. Nothing in the bar's extended history of self-governance suggests it to be an exception.<sup>81</sup> Rather, as discussion throughout this Essay suggests, lawyers' ethical codes have generally resolved conflicts between professional and societal objectives in favor of those doing the resolving.<sup>82</sup> In part, the problem is one of tunnel vision. No matter how well-intentioned, lawyers regulating lawyers cannot escape the economic, psychological, and political constraints of their position.<sup>83</sup>

The problem is compounded by attorneys' unwillingness to consider it a problem. The American bar's traditional position is that "[w]hile superficially there may appear to be a tension between professional responsibility and self-interest, in fact, broadly viewed, there is none."<sup>84</sup> Among bar leaders, debates about professional regulation uniformly assume that professional autonomy is essential. According to the Model Rules' Preamble, self-regulation serves the public interest because it "helps maintain the legal profession's independence from government domination."<sup>85</sup> Such independence is, in turn, considered "an important force in preserving government under law, for abuse of legal authority is more readily challenged by a profession whose members are not depen-

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PROFESSIONS AND PUBLIC POLICY 19 (Philip Slayton & Michael Trebilcock eds., 1978).

81. Deborah L. Rhode, *Why the ABA Bothers: A Functional Perspective on Professional Codes*, 59 TEX. L. REV. 689, 691-92 (1981) (citations omitted).

82. Richard L. Abel, *Why Does the ABA Promulgate Ethical Rules?*, 59 TEX. L. REV. 639 (1981); Thomas D. Morgan, *The Evolving Concept of Professional Responsibility*, 90 HARV. L. REV. 702 (1977).

83. Rhode, *supra* note 81, at 720.

84. Association of the Bar of the City of New York (July 1, 1987), *quoted in* Committee on the Profession, Association of the Bar of the City of New York, *Is Professionalism Declining?*, 47 THE RECORD 129, 133 (1992).

85. MODEL RULES pmb. para. 10 (1992).

dent on government for the right to practice."<sup>86</sup>

Majoritarian governmental control and total professional autonomy are not, however, the only alternatives. Other countries have established more hybrid regulatory structures. And in at least some instances, most recently in Great Britain, such structures have resulted in more consumer-oriented reforms than their professionally-dominated counterparts.<sup>87</sup> So too, some state legislators have proposed oversight structures that would remain independent of both the elected government and the organized bar. One California statute would have established a board under state supreme court auspices with members appointed by different decision makers and representing diverse constituencies.<sup>88</sup> Of course, as subsequent discussion acknowledges, such a shift in oversight authority is no guarantee of effective oversight. Yet it is also plausible to suppose that a more publicly accountable body could generate a more socially responsive governance structure.

Strengthening professional rules is desirable not only to serve the socializing functions discussed in part IV, but also to enhance the usefulness of civil liability proceedings. Although both the Code and Model Rules disclaim any intent to establish norms outside the disciplinary process, neither provides convincing justification for that limitation.<sup>89</sup> Nor have courts and commentators supplied one. Civil liability proceedings routinely invoke bar codes to help establish the standard of appropriate conduct, and that function should appropriately inform the drafting process.<sup>90</sup>

In addition to changes in ethical rules, regulatory initiatives are essential on two levels. For the profession generally, more external oversight is necessary through bar discipline, judicial sanc-

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86. *Id.*

87. For a discussion of British initiatives designed to promote greater competition, see *Survey: The Legal Profession*, THE ECONOMIST, July 18, 1992, at 3, 15, 17. For a comprehensive account of the improvements in the California disciplinary system after appointment of a state bar monitor and other reforms initiated by the California legislature, see Report of Stephen Gillers, On Lawyer Discipline, Submitted to the Supreme Court of New Jersey (Dec. 22, 1993) (on file with author); *infra* note 127.

88. RHODE & LUBAN, *supra* note 24, at 953.

89. See MODEL RULES Scope ¶ 6 ("The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability."); MODEL CODE Preliminary Statement (1983) ("The Model Code . . . does [not] undertake to define standards of civil liability of lawyers for professional conduct."). For a critical review, see WOLFRAM, *supra* note 78, at 48-64.

90. See cases cited in Committee on the Profession, *supra* note 84, at 147-61 (dialogue of Stephen Gillers).

tions, and civil liability proceedings. For lawyers working in organizations, more internal oversight both of client and collegial conduct is needed through firm-specific standards, audit systems, and whistleblowing provisions.

The point of this overview is not to work through the details of such initiatives. It is rather to identify certain general considerations that should inform regulatory strategies and then to suggest how such strategies could address chronic problems of professionalism.

### A. *External Oversight: Bar Regulatory Frameworks*

Formal regulation of the American bar occurs primarily through admission and disciplinary processes. This regulatory system is misdirected in several respects. It places too much reliance on entry-level screening for competence and character, and devotes too little effort to monitoring and remedying misconduct. What monitoring does occur is overly reactive, inflexible, and self-protective.

#### 1. Admissions

Most jurisdictions' principal tests for professional competence are the bar exam and a three-year law school graduation requirement. Both methods are over- and under-inclusive. They exclude individuals with specialized skills who would be perfectly qualified to provide certain legal services, while providing no assurance that admitted practitioners are or will remain competent in their chosen fields. No showing has ever been made that performance either on bar exams or in law school correlates with performance in practice.<sup>91</sup> Although it is reasonable to infer some relationship, it is not self-evident that an inflexible three-year educational program plus a general knowledge test offer the best screening for many specialties. Nor do states' widely varying exam cut-off scores and procedures for admitting out-of-state lawyers bear any demonstrated

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91. See David M. White, *The Definition of Legal Competence: Will the Circle Be Unbroken?*, 18 SANTA CLARA L. REV. 641, 683-84, n.190 (1978); see also cases cited in RHODE & LUBAN, *supra* note 24, at 904-06. For a discussion of the need for better skills training in law school, see ABA Section of Legal Education and Admissions to the Bar, *Legal Education and Professional Development—An Educational Continuum*, Report of the Task Force on Law Schools and the Profession: Narrowing the Gap (1992); FRANCES ZEMANS & VICTOR ROSENBLUM, *THE MAKING OF A PUBLIC PROFESSION* (1981); Bryant G. Garth & Joanne Martin, *Law Schools and the Construction of Competence*, 43 J. LEGAL EDUC. 469 (1993).

relationship to competence.<sup>92</sup> The limited data available indicates that legal education and standardized tests neglect skills that surveyed lawyers find most important, while disproportionately excluding low income and non-white applicants.<sup>93</sup> Although some jurisdictions have begun to require continuing legal education, existing requirements (of ungraded participation for a minimal number of hours) are unlikely to improve performance among those most in need of improvement.<sup>94</sup>

Character screening has been similarly misfocused. In theory, the bar's moral fitness requirement serves two objectives: safeguarding clients and the administration of justice from potential abuses; and maintaining the bar's public image and a sense of moral community. In practice, however, the character requirement subverts or trivializes the ideals it seeks to affirm.

As the United States Supreme Court has acknowledged, the definition of character is "unusually ambiguous," and "necessarily reflect[s] the attitudes, experiences, and prejudices of the defin-er."<sup>95</sup> Although criteria for exclusion must have a "rational connection" with fitness to practice law,<sup>96</sup> what constitutes such a connection is widely disputed. Review of judicial and bar committee decision making reveals highly idiosyncratic and inconsistent judgments, both within and across jurisdictions:

The conventional view has been that certain illegal acts—regardless of the likelihood of their repetition in a

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92. Michael K. McChrystal, *Legitimizing Realities: State-Based Bar Admission, National Standards, and Multistate Practice*, 3 GEO. J. LEGAL ETHICS 533 (1990); Michael Wines, *At the Bar*, N.Y. TIMES, Apr. 15, 1994, at B6 (quoting testing expert Steve Klein's conclusion that "standards for passing vary tremendously across states . . . [b]ut that doesn't mean people who pass in one state are necessarily better lawyers than those in another," particularly since almost all candidates ultimately pass). For a critical review of provisions concerning out-of-state attorneys, see RHODE & LUBAN, *supra* note 24, at 936.

93. See ZEMANS & ROSENBLUM, *supra* note 91, at 124-28 (finding that the skills that practitioners found most important included fact gathering, instilling others' confidence, and effective oral expression, but that these were not the skills that legal education emphasizes, such as knowledge of theory underlying law; the central ability that bar exams measure, rote memorization, did not even make practitioners' list). For a discussion of the disproportionate impact of bar exams and law school requirements, see DANNYE HOLLEY & THOMAS KLEVEN, *Minorities and the Legal Profession: Current Platitudes, Current Barriers*, 12 T. MARSHALL L. REV. 299, 305-41 (1987).

94. See Joseph W. Little, *Ethics: Political Beliefs and Government Compulsion*, 1 PROF. ETHICS 101, 104 (1992); Susan R. Martyn, *Lawyer Competence and Lawyer Discipline: Beyond the Bar?*, 69 GEO. L.J. 705, 725-32 (1981).

95. *Konigsberg v. State Bar*, 353 U.S. 252, 263 (1957).

96. *Schwartz v. Board of Bar Examiners*, 353 U.S. 232, 239 (1957).

lawyer-client relationship—evidence attitudes toward law that cannot be countenanced among its practitioners . . . . The difficulty, of course, is that this logic licenses inquiry into any illegal activity, no matter how remote or minor . . . . In fact, bar inquiry frequently extends to juvenile offenses and parking violations, and conduct warranting exclusion has been thought to include traffic convictions and cohabitation.

. . . Violation of a fishing license statute ten years earlier was sufficient to cause one local Michigan committee to decline certification. But, in the same state, at about the same time, other examiners on the central board admitted individuals convicted of child molesting and conspiring to bomb a public building.<sup>97</sup>

As currently applied, the character requirement is not an effective screening device. Only a tiny number of candidates are denied admission (an estimated 0.2% of all applicants).<sup>98</sup> Although some substantial group may be deterred from applying, it is by no means clear that either these individuals or those denied entrance would have been likely to commit abuses:

[A] vast array of social science research has failed to find evidence of consistent character traits . . . . [E]ven the slightest change in situational variables dramatically alter[s] tendencies toward deceit; one [cannot] predict cheaters in one class on the basis of cheating in another . . . . [Most] findings suggest that the person with a "truly generalized conscience . . . is a statistical rarity." Although individuals clearly differ in their responses to temptation, contextual pressures have a substantial effect on moral conduct independent of any generalized predisposition . . . .

Although empirical evidence on lawyers' ethics is fragmentary, it also suggests that . . . . an attorney's willingness to violate legal or professional rules depends heavily on the exposures to temptation, client pressures, and collegial attitudes in his practice setting.<sup>99</sup>

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97. Deborah L. Rhode, *Moral Character as a Professional Credential*, 94 YALE L.J. 491, 537-38 (1985) (footnotes omitted).

98. *Id.* at 516.

99. *Id.* at 557-59 (footnotes omitted) (quoting W. MISCHEL, PERSONALITY AND ASSESSMENT 26 (1968)).

So too, a comparison of bar admission and disciplinary processes raises further doubts about current character screening. From a public policy perspective, the rationale for bar oversight is stronger for abuses committed after than before licensure. Yet the bar's administration of admission and disciplinary processes has yielded precisely the reverse double standard; both substantive and procedural requirements are far more forgiving for practitioners than for applicants.<sup>100</sup> But "[i]f certain nonprofessional conduct is sufficiently probative to withhold a license, why is it not also grounds for license revocation? As long as bar members are unwilling to monitor their colleagues' parking violations, psychiatric treatment, and alimony payments, what justifies their reliance on such evidence in screening applicants?"<sup>101</sup>

A regulatory system more attentive to public interests than professional image should reverse current priorities. Less effort should center on predicting competence and character; more attention should focus on monitoring actual practices. Admission criteria should recognize in form what is true in fact: Three years of law school and passage of a bar exam are neither necessary nor sufficient to secure cost-effective services in many substantive areas, particularly those involving routine form preparation.<sup>102</sup> The public generally would benefit from a less rigid licensing structure in which individuals with varying degrees of training competed in the market for legal services and were subject to more effective performance review and consumer remedies.

Similarly, efforts now spent evaluating the moral character of bar applicants should be redirected toward regulating conduct of admitted attorneys. If disqualification for some behavior is necessary to maintain public trust, that behavior should be specified by publicly accountable regulatory agencies. Standards for admitted attorneys should be no more lenient than for bar applicants, and neither group should be subject to the idiosyncratic and intrusive review that now occurs at the entry level. Bright line character rules, such as a ban on practice for a specified period after a felony conviction, or exclusion of attorneys disbarred in other jurisdictions, would be preferable to the *ad hoc* subjectivity of the current system.<sup>103</sup>

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100. *Id.* at 547.

101. *Id.* at 549.

102. See Rhode, *supra* note 65.

103. Rhode, *supra* note 97, at 587.

## 2. Discipline and Malpractice

In 1970, a special American Bar Association commission identified a "scandalous situation" in lawyer discipline.<sup>104</sup> Some two decades later, much in that situation had remained unchanged, as yet another ABA Commission reported.<sup>105</sup> Fundamental inadequacies in the disciplinary process have persisted in part because of one central problem that neither Commission acknowledged: the profession's almost exclusive control over its own regulation. Lawyers have interests that overlap but are not coextensive with those of the public. Most attorneys want a process that is sufficiently responsive to clear abuses to protect clients and the profession's public image, as well as forestall more intrusive state regulation. But few lawyers have supported a system that would require major increases in their own bar dues, that would significantly expand oversight of their own conduct, or that would impose substantial risks of serious sanctions.

The result is a regulatory structure that rests on inconsistent premises. Standards governing admission and competition assume that a free market in legal services is inappropriate; clients are not in a position to make informed judgments about the quality and cost of services received. Yet bar disciplinary processes have worked on the opposite assumption. They rely almost exclusively on client grievances (together with felony convictions) as sources of information about attorney misconduct.

Lawyers and judges rarely report professional abuses, and little effort has focused on counteracting the obvious economic and psychological barriers to reporting.<sup>106</sup> Many attorneys do not feel sufficiently blameless to cast the first stone unless they are sure of a fellow practitioner's serious misconduct. And the incentives to gather relevant information are almost non-existent. Prosecution of disciplinary charges poses classic free rider problems. As one practitioner put it when explaining why he had not filed a grievance, "I represent Ford Motor Company, not the next guy . . . . I have a very narrow balance sheet."<sup>107</sup> Even lawyers and judges who take

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104. See ABA COMMISSION ON EVALUATION OF DISCIPLINARY ENFORCEMENT PROBLEMS AND RECOMMENDATIONS ON DISCIPLINARY ENFORCEMENT (Final Draft) (1970) (finding across-the-board failure of disciplinary mechanisms).

105. ABA REPORT, *supra* note 56.

106. See *id.* at 92; ABA Comm'n on Professionalism, *supra* note 69, at 286; RICHARD ABEL, AMERICAN LAWYERS 144 (1989) (analyzing factors which deter lawyers from reporting abuses).

107. Stephen Brill, *Roy Cohn Rides Again*, AM. LAW., Mar. 1980, at 5, 5; see also Da-

a broader view of their professional obligations are often unwilling to file charges with agencies that have proved ineffective in responding.<sup>108</sup>

As a consequence, most ethical violations never reach regulatory agencies. Many clients and injured third parties lack information about attorneys' misconduct or bar grievance processes; others are deterred by the cost, complexity, or seeming futility of reporting.<sup>109</sup> Ethical violations from which clients benefit, such as discovery abuse or misrepresentation in negotiations, is also unlikely to reach oversight agencies.

The system is similarly ineffective in responding to grievances that are in fact reported. Resource constraints have led disciplinary agencies to decline jurisdiction over certain abuses for which an adequate civil remedy is theoretically available, such as "mere" negligence or excessive fees. The result is a mismatch between client needs and regulatory responses. The problems that consumers are most likely to experience, such as neglect and overcharging, are least likely to fall within agency jurisdiction.<sup>110</sup> Agencies will also stay proceedings during the pendency of civil or criminal actions. In the unusual cases where judges or lawyers report abuses to bar agencies, those agencies will often refer the case back to the courts for final resolution, leaving the injured party stranded in between.<sup>111</sup>

Even cases that fall squarely within bar disciplinary jurisdiction often fare no better. State agencies are generally underfunded and

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vid O. Weber, "Still in Good Standing": *The Crisis in Attorney Discipline*, A.B.A. J., Nov. 1987, at 58, 61 (quoting Geoffrey Hazard Jr.'s observation that reporting misconduct seems to many lawyers like "buying trouble").

108. See MODEL CODE DR 7-105.

109. ABA REPORT, *supra* note 56; ABEL, *supra* note 106, at 144 (reporting survey data finding that only 13% of clients were aware of disciplinary procedures); Sandra L. DeBrau & Bruce W. Burton, *Lawyer Discipline and Disclosure Advertising: Towards a New Ethics*, 72 N.C. L. REV. 351 (1994) (describing lack of information for consumers); Robert C. Fellmeth, *The Disciplinary System of the California State Bar: An Initial Report*, CAL. REG. L. REP., Summer 1987, at 1, 5-6 (describing bar referrals and failures to publicize or even list phone numbers for client complaints).

110. See Kay A. Ostberg, *HALT, Attorney Discipline: National Survey and Report* (1990); ABA REPORT, *supra* note 56, at 9. For a discussion of this longstanding disparity between agencies' interest in deviance and consumers' needs for dispute resolution, see DEBORAH L. RHODE, *PROFESSIONAL RESPONSIBILITY: ETHICS BY THE PERSUASIVE METHOD* 77-78 (1994); Eric H. Steel & Raymond T. Nimmer, *Lawyers, Clients, and Professional Regulation*, 1976 AM. B. FOUND. RES. J. 917, 959-60.

111. Richard H. Underwood, *Confessions of an Ethics Chairman*, 16 J. LEGAL PROF. 125, 130-31 (1991).



understaffed, and over 90% of complaints are dismissed without investigation.<sup>112</sup> Although some significant percentage of these complaints are inherently implausible or reflect dissatisfaction with outcomes rather than attorney performance, the high dismissal rate is at least partly attributable to inadequate resources. Funding constraints also prevent agencies from undertaking proactive, independent investigations and limit their capacity to assist clients who need help in filing grievances. In most jurisdictions, the confidentiality of the process, unless some public sanction is issued, means that attorneys with large numbers of pending or dismissed complaints receive a "clean bill of health" from disciplinary authorities.<sup>113</sup> Bar decision makers have nonetheless rejected proposals for greater public disclosure out of concern for lawyers who might be unjustly accused.<sup>114</sup>

Concern for clients unjustly exploited has not met with similar solicitude. Even cases that satisfy the stringent "clear and convincing" standard applicable in disciplinary proceedings often conclude without adequate remedies. In principle, the objective is protection of the public, not punishment of the lawyer.<sup>115</sup> In practice, the system fails in both respects. Lawyers inevitably experience sanctions as punitive, and decision makers' reluctance to impose them prevents adequate protection. Less than 2% of complaints result in public sanctions, and they are rarely directed at practitioners from mainstream firms and organizations.<sup>116</sup> Here again the mismatch between client expectations and regulatory outcomes is apparent, as two cases decided by the same state Supreme Court in the same year attest. An Indiana lawyer who knowingly allowed marijuana to grow on his premises was disbarred; a lawyer who "deceived

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112. Ostberg, *supra* note 110; Michael J. Hall & Clyde Leland, *The State Bar Court One Year Later: Is It Working and Is It Worth the Cost?*, CAL. LAW., Dec. 1990, at 30, 31.

113. See Fellmeth, *supra* note 109, at 7. Only Oregon permits disclosure of complaints.

114. Don J. DeBenedictis, *ABA Adopts Most Discipline Proposals*, A.B.A. J., Apr. 1992, at 28 (reviewing an ABA House of Delegates ruling).

115. ABA JOINT COMMITTEE ON PROFESSIONAL SANCTIONS, STANDARDS FOR IMPOSING LAWYER SANCTIONS 17 (1986).

116. See James Evans, *Lawyers at Risk*, CAL. LAW., Oct. 1989, at 45, 46-47; Ostberg, *supra* note 110. For examples of the leniency toward established attorneys, see *District of Columbia Bar v. Kleindienst*, 345 A.2d 146 (D.C. Cir. 1975) (30-day suspension for United States Attorney General who committed perjury in confirmation hearings); Tom Goldstein, *Ex-Partner in a Major Law Firm Is Spared Disbarment*, N.Y. TIMES, July 23, 1979, at 135 (noting that there was no disbarment for a Wall Street partner who committed perjury).

his clients, . . . neglected his clients' cases and abused his clients' trust" was suspended for forty-five days.<sup>117</sup>

In part, this sanctioning structure reflects a "there but for the grace of God go I" attitude among regulators. Most offenders have stress-related problems linked to family difficulties, substance abuse, financial strain, or other work-related pressures;<sup>118</sup> most decision makers appear more able to empathize with fellow professionals than with clients. Although many regulatory boards have lay representatives, these individuals never constitute a majority, are selected by the profession, do not represent organized public interest groups, and generally do not push for more stringent sanctions than their lawyer colleagues.<sup>119</sup>

Although clients may find more sympathy from jurors in malpractice cases, the cost of those proceedings and the difficulties of proof make them inadequate remedies for most grievances.<sup>120</sup> So too, many valid civil liability claims go unredressed because the lawyer has insufficient insurance or personal assets, and the bar's

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117. *In re Moore*, 453 N.E.2d 971, 973-74 (Ind. 1983); *In re Holloway*, 452 N.E.2d 934, 935 (Ind. 1983). These are not isolated examples. See DeBrau & Burton, *supra* note 109 at 353; Matthew J. Nasuti, *What Does It Take?*, CAL. LAW., Feb. 1992, at 10 (letter to editor).

118. Evans, *supra* note 116, at 48; Robert C. Fellmeth, *Fifth Progress Report of the State Bar Disciplinary Monitor* (Sept. 1, 1989).

119. See BENJAMIN SHIMBERG ET AL., OCCUPATIONAL LICENSING: PRACTICES AND POLICIES 231 (1973) (arguing that the public interest is not served by lay representation); Harry W. Arthurs et al., *Canadian Lawyers: A Peculiar Professionalism*, in 2 LAWYERS IN SOCIETY: THE COMMON LAW WORLD 123, 139 (Richard L. Abel & Philip S.C. Lewis eds., 1988) (noting that non-professionals have limited role); Michael Franck, *Pitfalls in Lay Control*, 59 MICH. B.J. 680 (1980) (noting that lay members on disciplinary boards generally do not support more severe sanctions than lawyer members); see also RHODE & LUBAN, *supra* note 24, at 130-31 (discussing proposals for greater nonlawyer representation); R. E. Olley, *The Future of Self-Regulation: A Consumer Economist's Viewpoint*, in THE PROFESSIONS AND PUBLIC POLICY, *supra* note 80, at 86 (noting that lay representatives who are not accountable to public interest groups tend to lose independent perspectives).

120. Bar data from the late 1980s indicated that over two-thirds of such claims resulted in no payment. Of those that were successful, two-thirds provided recoveries under \$1000 and most involved fairly obvious errors such as missing deadlines, neglecting to file documents, or failing to contact clients and follow their instructions. RHODE & LUBAN, *supra* note 24, at 957 (citation omitted); ABA Standing Committee on Lawyers' Professional Liability, *Characteristics of Legal Malpractice: Report of the National Legal Malpractice Data Center* 82-83 (1989). For other research suggesting that successful claim rates may be higher, but that current remedial structures are inadequate, see Manny R. Ramos, *Legal Malpractice: The Profession's Dirty Little Secret*, 47 VAND. L. REV. (forthcoming fall 1994). As Geoffrey Hazard notes, malpractice is only practical for open-and-shut cases or those involving substantial damages. Geoffrey C. Hazard, *Ethics*, NAT'L L.J., July 6, 1992, at 15.

client security funds are woefully inadequate.<sup>121</sup>

A more effective regulatory system will require a fundamental rethinking of self-regulatory premises. As previous discussion indicated, some improvement is likely to occur from removing professional control over the disciplinary process. That is not, however, to suggest that formal reallocation of authority is an all-purpose prescription for regulatory pathologies. As experience with administrative agencies makes clear, such bodies are often vulnerable to capture by the groups to be regulated. These groups not only have incentives and resources for influence beyond those of a diffuse public, but their cooperation may be critical to agency performance. The result is often a "friendly" relationship that constrains administrative oversight.<sup>122</sup> Yet where such relationships are absent, the targets of regulation typically mobilize to alter personnel and policies or else circumvent their impact.<sup>123</sup> Lawyers, who often successfully pursue such strategies for clients, are likely to be equally adept in their own behalf.

Moreover, in a context where professional performance is difficult to monitor and a high degree of professional discretion is essential, some ethic of self-regulation is important to maintain. The danger of overly intrusive, bureaucratized external structures is that they may erode the very sense of personal responsibility that is most central to effective enforcement.<sup>124</sup>

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121. Estimates of the number of lawyers without malpractice insurance range from 20-45% in a given jurisdiction. See Daniel B. Moskowitz, *Lawyers Cut Back on Malpractice Insurance as Rates Increase*, WASH. POST, July 1, 1991, at F24 (quoting an estimate of 35%); Debra Moss, *Going Bare: Practicing Without Malpractice Insurance*, 73 A.B.A. J., Dec. 1987, at 82, 82 (quoting Duke Stern of the ABA Standing Committee on Lawyers' Professional Liability who estimated 20-45%); Committee to Improve the Availability of Legal Services, *Final Report to the Chief Judge of the State of New York* (1990), reprinted in 19 HOFSTRA L. REV. 755, 809 n.47 (1991) (36% of California lawyers). For client security funds, see Deborah M. Chalfie, *Dumping Discipline: A Consumer Protection Model for Regulating Lawyers*, LOY. CONSUMER L. REP., Fall 1991, at 4, 7 (noting that client security funds are limited in amount and by type of claim; often only victims of theft can recover); James Bennet, *Thieving Lawyers Draining Client Security Funds*, N.Y. TIMES, Dec. 27, 1991, at B16 (describing gross inadequacy of funds).

122. Tom DeVos, *Toward More Effective Regulation of Corporate Behavior*, in CORRIGIBLE CORPORATIONS AND UNRULY LAW 89-90 (Brent Fisse & Peter A. French eds., 1985); CASS R. SUNSTEIN, *AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE* 98 (1990); James Q. Wilson, *The Politics of Regulation*, in THE POLITICS OF REGULATION (James Q. Wilson ed., 1980).

123. See DeVos, *supra* note 122.

124. For a general account of the costs of such regulation, see EUGENE BARDACH & ROBERT A. KAGAN, *GOING BY THE BOOK: THE PROBLEM OF REGULATORY UNREASONABLENESS* 320-23 (1982).

Yet not all forms of external oversight present equal risks of co-optation or subversion of regulatory objectives. Agencies can minimize some of those risks by relying on long-term career employees and building public interest representation and accountability into the regulatory process.<sup>125</sup> Moreover, some loss of regulatory control does not necessarily imply a corresponding loss of professional responsibility. To the contrary, most experts on occupational licensure advocate external checks as a means of prodding professionals to live up to their own aspirations.<sup>126</sup>

Even without such a reallocation of control, strategies that increase public accountability are also likely to increase effectiveness. The California legislature greatly improved state disciplinary processes by using its power over bar dues to promote essential reforms and by appointing a state bar monitor to evaluate their implementation.<sup>127</sup> Experience in other regulatory contexts suggests the usefulness of tripartite frameworks, in which organized public interest groups assume an official role in overseeing the oversight structure.<sup>128</sup> Where no adequate organizations exist, the government can encourage their creation through financial support and the assurance of a significant regulatory function. Such groups could both create pressure for reforms and monitor their effectiveness in two areas: in regulatory agencies' capacity to identify misconduct and in their ability to provide adequate deterrent and remedial structures.

Expanding regulators' monitoring capacities will require expansion of resources and of proactive strategies. For example, the bar

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125. See Wilson, *supra* note 122.

126. For a discussion of the value of limiting professional autonomy, see ELIOT FREIDSON, *PROFESSION OF MEDICINE: A STUDY OF THE SOCIOLOGY OF APPLIED KNOWLEDGE* 137-51 (1970); ELIOT FREIDSON, *PROFESSIONAL DOMINANCE: THE SOCIAL STRUCTURE OF MEDICAL CARE* 93, 134 (1970); ELIOT FREIDSON, *PROFESSIONAL POWERS: A STUDY OF THE INSTITUTIONALIZATION OF FORMAL KNOWLEDGE* 63-80 (1986); Andrew K. Dolan & Nicole D. Urban, *The Determinants of the Effectiveness of Medical Disciplinary Boards: 1960-1977*, 7 *LAW & HUM. BEHAV.* 203, 215-16 (1983); Elton Rayack, *Medical Licensure: Social Costs and Social Benefits*, 7 *LAW & HUM. BEHAV.* 147, 155 (1982). For a discussion of federally mandated changes in accountants' responsibilities, see DENZIL Y. CAUSEY, JR., *DUTIES AND LIABILITIES OF PUBLIC ACCOUNTANTS* 49-54 (1979); see also Chalfie, *supra* note 121, at 8-9 (noting that independent agencies have a measure of accountability that other systems lack).

127. See Reynolds Holding, *Legislators Consider Bill to Eliminate State Bar*, S.F. CHRON., July 27, 1992, at A1; 'Remarkable' Improvement Cited in Bar's Discipline System, CAL. LAW. NOV. 1991, at 78; Report of Stephen Gillers, *supra* note 87.

128. See IAN AYRES & JOHN BRAITHWAITE, *RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE* 56-59, 88-89 (1992).

could improve disciplinary outreach efforts by increasing publicity, by requiring disclosure of grievance channels in lawyer-client retainer agreements, and by providing assistance to complainants. Regulatory authorities could also initiate investigations based on malpractice complaints, court-imposed sanctions, and random checks of trust funds. Increased accountability of disciplinary responses could occur if records and proceedings were publicly accessible. Greater efforts could be made to enforce rules requiring lawyers to report misconduct, and greater pressure could be placed on judges to forward similar information. A recent Illinois decision imposing attorney discipline under such circumstances reportedly has increased practitioners' willingness to file complaints.<sup>129</sup>

At the remedial level, the bar needs more accessible and less self-protective enforcement structures. Alternative forms of dispute resolution and mandatory arbitration under neutral panels should be available (at the client's discretion) for performance as well as fee-related disputes. Serious misconduct should receive serious sanctions. License revocations, extended suspensions, and probation should be routine responses. They should also be accompanied by conditions for reinstatement that are likely to provide both client remedies and societal protection (*e.g.*, restitution, completion of office management programs, substance abuse treatment, and so forth). A centralized directory or toll-free phone bank should supply information about lawyers' disciplinary records, and regulatory agencies should make greater use of publicity to reinforce sanctions. Client security funds should be dramatically increased, and adequate malpractice insurance should be required.

### *B. Internal Oversight*

Attention also needs to focus on the organizational context of ethical violations. A growing body of work on corporate compliance structures yields a useful and largely untapped resource for rethinking bar regulatory structures. In general, this work makes clear that internal methods of securing compliance work more effectively than external oversight structures.<sup>130</sup> Organizations generally are in a better position to secure information and cooperation

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129. *In re Himmel*, 533 N.E.2d 790 (Ill. 1994). Ronald D. Rotunda, *The Lawyer's Duty to Report Another Lawyer's Unethical Violations, in the Wake of Himmel*, 1988 U. ILL. L. REV. 977, 992.

130. AYRES & BRAITHWAITE, *supra* note 128, at 25-35, 93, 106-19; JOHN BRAITHWAITE, *CRIME, SHAME AND REINTEGRATION* 57-70, 134 (1989).

than regulatory agencies. Most people respond better to sanctions from peers than from more distant authorities, and restructuring institutional incentives is more likely to secure compliance than occasionally imposing sanctions.<sup>131</sup> Organizations employing lawyers could substantially increase the likelihood of ethical conduct through monitoring and reward structures giving priority to that objective. Obvious examples include restructured billing incentives, firm-specific ethical guidelines, explicit reporting channels, internal education programs, and ethics committees that focus on more than conflicts of interest.<sup>132</sup>

Such initiatives could be required for all employers over a certain size, or for those whose lawyers have received civil, judicial, or disciplinary sanctions. Where rule violations involve organizational failures, such as inadequate supervision or skewed incentive structures, the organization should be accountable. More innovative penalties and remedial directives, such as those developed for corporate misconduct, should become standard tools in professional regulation. For example, courts or disciplinary agencies could require that lawyers who committed malpractice or discovery abuse submit a regulatory plan to prevent subsequent misconduct by other members of their organization. Such a plan might include new educational programs, oversight committees, reporting channels, and so forth. Research on white-collar offenses also suggests that community service or publicity of organizational sanctions might have greater deterrent effect than prevailing approaches.<sup>133</sup>

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131. AYRES & BRAITHWAITE, *supra* note 128; BRAITHWAITE, *supra* note 130; Toni Makkai & Valerie Braithwaite, *Professionalism, Organizations, and Compliance*, 18 LAW & SOC. INQ. 33, 35, 37 (1993) (describing effects of organizational culture on professionals' compliance behavior). For a general discussion of strategies for increasing ethical responsibility in organizational cultures, see David Luban et al., *Moral Responsibility in an Age of Bureaucracy*, 90 MICH. L. REV. 2348 (1992).

132. See discussion *infra* text accompanying notes 165-66. Ethics codes and committees will accomplish little if they are in conflict with organizational rewards and punishments, or if adequate monitoring strategies are not in place. See generally Kenneth E. Goodpaster, *Ethical Imperatives and Corporate Leadership*, in ETHICS IN PRACTICE, *supra* note 30, at 212, 225; CHARLES S. MCCOY, *MANAGEMENT OF VALUES: THE ETHICAL DIFFERENCE IN CORPORATE POLICY AND PERFORMANCE* 192-202 (1985); Jeffrey Sonnenfeld & Paul Lawrence, *Why Do Companies Succumb to Price Fixing?*, in ETHICS IN PRACTICE, *supra* note 30, at 184, 192-98; Patrick E. Murphy, *Creating Ethical Corporate Structures*, SLOAN MGMT. REV., Winter 1989, at 81.

133. BRENT FISSE & JOHN BRAITHWAITE, *THE IMPACT OF PUBLICITY ON CORPORATE OFFENDERS* (1983); Peter A. French, *Publicity and the Control of Corporate Conduct: Hester Prynne's New Image*, in CORRIGIBLE CORPORATIONS & UNRULY LAW 159 (B. Fisse & P. French eds. 1985); see also DeBrau & Burton, *supra* note 109 (arguing for

Current strategies of low visibility reprimands for most disciplinary violations and modest fines for most procedural violations do not impose the reputational costs or convey the lasting message that more innovative sanctions might provide.

### C. Whistleblowing

Individuals working within organizations generally find little to gain and much to lose from exposing misconduct. Harassment, isolation, blacklisting, dismissals, and denials of promotion are common consequences.<sup>134</sup> Those who make disclosures outside the organization typically run greater risks, because the major beneficiaries are also outsiders.<sup>135</sup> For the organization itself, the costs of external whistleblowing in terms of legal liability and adverse publicity generally outweigh any gains. The principal exception is where illegal or immoral actions would probably come to light eventually and early disclosure could prevent or significantly reduce their costs. However, in most cases of external whistleblowing, the benefits run to society generally or to innocent victims, not to the organization or to individuals who control employment decisions.

Although this asymmetry cannot be eliminated, its consequences can be somewhat mitigated. Organizations can reduce the circumstances in which external whistleblowing is necessary by establishing better internal reporting channels, such as hotlines and audit or

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disclosure of sanctions in lawyers' promotional materials).

134. See MYRON P. GLAZER & PENINA M. GLAZER, *THE WHISTLEBLOWERS: EXPOSING CORRUPTION IN GOVERNMENT AND INDUSTRY* 133-66 (1989) (describing methods of management retaliation); see also Karen L. Soeken & Donald R. Soeken, *A Survey of Whistleblowers: Their Stressors and Coping Strategies*, in *Whistleblower Protection Act of 1987: Hearings Before the Subcomm. on Federal Services, Post Office, and Civil Service of the Senate Comm. on Governmental Affairs*, 100th Cong., 1st Sess., 537 (1987) (surveying retaliation whistleblowers experienced, how it affected their health, how they coped and what motivated them to report violations); Linda K. Trevino & Bart Victor, *Peer Reporting of Unethical Behavior: A Social Context Perspective*, 35 *ACAD. MGMT. J.* 38 (1992); OFFICE OF MERIT SYSTEMS REVIEW AND STUDIES, U.S. MERIT SYSTEMS PROTECTION BOARD, *BLOWING THE WHISTLE IN THE FEDERAL GOVERNMENT: A COMPARATIVE ANALYSIS OF 1980 AND 1983 SURVEY FINDINGS* 6, 7 (1984); OFFICE OF MERIT SYSTEMS REVIEW AND STUDIES, U.S. MERIT SYSTEMS PROTECTIONS BOARD, *WHISTLEBLOWING AND THE FEDERAL EMPLOYEE* 3 (1981).

135. Terry M. Dworkin & Elletta S. Callahan, *Internal Whistleblowing: Protecting the Interests of the Employee, the Organization, and Society*, 29 *AM. BUS. L.J.* 267, 301-02 (1991); Marcia P. Miceli & Janet P. Near, *The Relationship Among Beliefs, Organizational Position, and Whistle-Blowing Status: A Discriminant Analysis*, 27 *ACAD. MGMT. J.* 687 (1984); Richard P. Nielsen, *Changing Unethical Organizational Behavior*, 3 *ACAD. OF MGMT. EXECUTIVE* 123 (1989).

ethics committees. State and federal legislation could extend protections against reprisal to the vast majority of employees who currently lack coverage.<sup>136</sup> Courts could similarly expand the common law rights of whistleblowers to sue for reprisals.<sup>137</sup>

In cases involving lawyers, courts too often have taken the opposite approach. Several have dismissed claims either because state law failed to recognize exceptions to employment-at-will doctrine or because the complaint involved communications subject to the attorney-client privilege.<sup>138</sup> Such decisions institutionalize precisely the wrong incentive structures. Given all the social, economic, and psychological pressures against informing, some minimum legal safeguards against reprisal are a crucial counterweight. As a coalition of legal ethics experts recently and successfully argued in a major New York case, we cannot maintain commitments to self-regulation unless we protect a lawyer who acts on them.<sup>139</sup>

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136. Current prohibitions generally cover only civil servants or reports to government agencies concerning fraud, waste, or statutory violations. Robert D. Boyle, *A Review of Whistle Blower Protections and Suggestions for Change*, 41 LABOR L.J. 821, 822-25 (1990); Dworkin & Callahan, *supra* note 135, at 269-85; Stephen M. Kohn & Michael D. Kohn, *An Overview of Federal and State Whistleblowing Protections*, 4 ANTIOCH L.J. 99, 101-11 (1986). Further legislation could, for example, make it an unfair labor practice to discharge an employee who reports to management or government agencies activity reasonably believed to be illegal, against public policy, or inconsistent with employer policy.

137. By the early 1990s, about one-half of all jurisdictions allowed employees to sue for wrongful discharge if they were fired for refusing to engage in unethical conduct. See Boyle, *supra* note 136, at 825-27. Protection is necessary in the remaining states, and coverage should extend to those penalized for reporting unethical or unlawful conduct.

138. *E.g.*, Willy v. Coastal Corp., 647 F. Supp. 116, 118 (S.D. Tex. 1986) (holding that termination of attorney's services does not fall within narrow public policy exception to at-will employment doctrine under Texas law), *rev'd*, 855 F.2d 1160 (5th Cir. 1988); *Herbster v. North Am. Co. for Life & Health Ins.*, 501 N.E.2d 343, 348 (Ill. App. Ct. 1986) (denying in-house lawyer's claim of retaliatory discharge due to confidential nature of lawyer-client relationship), *appeal denied*, 508 N.E.2d 728 (Ill. 1987), *cert. denied*, 484 U.S. 850 (1987); *cf.* Wiedner v. Skala, 544 N.Y.S.2d 971 (Sup. Ct. 1989) (finding no public policy exception to employment-at-will doctrine), *aff'd*, 562 N.Y.S.2d 930 (App. Div. 1990), *aff'd as modified*, No. 256, 1992 N.Y. LEXIS 4240 (Dec. 22, 1992) (reinstating plaintiff's breach of contract claim). *But see* Balla v. Gambro, Inc., 560 N.E.2d 1043 (Ill. App. Ct. 1990) (remanding claim for retaliatory discharge); *Mourad v. Automobile Club Ins. Ass'n*, 465 N.W.2d 395 (Mich. Ct. App. 1991) (upholding \$1.25 million jury award for constructive discharge of in-house lawyer who sued for retaliatory discharge and demotion), *appeal denied*, 478 N.W.2d 443 (Mich. 1991).

139. See Brief of Amicus Curiae in Support of Plaintiff-Appellants' Appeal, *Wiedner v. Skala*, N. 256, 1992 N.Y. LEXIS 4240, (on file with author).



### D. Targeting Regulatory Strategies

Any serious improvement in ethical enforcement will require not only the general redirections in regulatory policy noted above, but also more structural approaches targeted to specific problems. The over- and underrepresentation of client interests described in part I involve different socioeconomic dynamics and require different institutional responses. The following analysis suggests the level of detail and the range of strategies that are necessary for effective enforcement.

#### 1. Sanctions for Procedural Abuse

Despite a cottage industry of committees, commissions, and commentary devoted to curtailing procedural abuse, most remedies to date have raised as many difficulties as they have solved. Courts have a variety of sanctioning powers; the most important is Rule 11 of the Federal Rules of Civil Procedure and its state court analogues. The rule provides that a lawyer's signature on any filing signifies that "to the best of the [signer's] knowledge, information and belief formed after an inquiry reasonable under the circumstances," the filing has evidentiary support, is "warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law," and "is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation." A court that finds a Rule 11 violation may impose an "appropriate sanction," which may include fines sufficient to cover the reasonable expenses of opposing parties as a result of the violation.

Until its amendment in 1983, the Rule made sanctions discretionary rather than mandatory and imposed no requirement of reasonable inquiry. In effect, this earlier version demanded a finding of subjective bad faith, and that standard was almost never met.<sup>140</sup> After the 1983 amendments requiring inquiry and mandating sanctions for any violation, Rule 11 enforcement escalated rapidly. Motions for sanctions became a standard part of the advocate's arsenal and generated more of the harassing litigation that they were meant to deter. The problem was exacerbated by the ambiguity of standards governing "reasonable inquiry," "good faith," and "well

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140. Between 1950 and 1983, there were only 60 reported decisions involving nontechnical violations of Rule 11. In the first years after amendment, there were over a thousand. See RHODE & LUBAN, *supra* note 24, at 200, and sources cited therein.

grounded in fact." In one study, almost 300 judges divided almost evenly about whether to impose sanctions in six out of ten hypothetical cases.<sup>141</sup> According to some, although not all research, courts have exercised their discretion to penalize civil rights plaintiffs.<sup>142</sup>

In response to these problems, the United States Judicial Conference proposed, and the Supreme Court approved, further amendments to the Rule. The most significant changes make sanctions once again discretionary, and create a 21 day "safe harbor" interval, during which a party notified of a Rule 11 motion can withdraw the offending papers without penalty. Under these amendments, sanctions would "normally" be imposed on firms as well as individual offenders.<sup>143</sup>

For those concerned with institutionalizing ethics, this history is instructive in several respects. The first is that it helps to explain why bar ethical codes have been so ineffectual in response to procedural abuse. Both the Code and Model Rules enjoin lawyers from asserting frivolous positions or taking positions merely to harass, but exclude actions that can be supported by a "good faith argument for an extension, modification, or reversal of existing law."<sup>144</sup> Like Rule 11 before the 1983 amendments, these provisions have proven largely unenforceable in practice.<sup>145</sup> Not only is the burden of proving a violation unrealistically high, but litigants have little if anything to gain from referring cases to bar disciplinary agencies. Those agencies generally will not impose fines that compensate complainants. As noted earlier, most disciplinary systems stay proceedings pending the outcome of related litigation, and decline jurisdiction over matters where an alternative civil remedy is available. Yet that alternative is often ineffective, because the

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141. SAUL M. KASSIN, FEDERAL JUDICIAL CENTER, AN EMPIRICAL STUDY OF RULE 11 SANCTIONS at ix, 17 (1985); see also George P. Joseph, *Redrafting Rule 11*, NAT'L L.J., Oct. 1, 1990, at 13, 14 (noting that trial courts have also imposed sanctions for "meritless" positions that appellate courts have later upheld).

142. KASSIN, *supra* note 141, at x, 38-39; David B. Wilkins, *Who Should Regulate Lawyers?*, 105 HARV. L. REV. 799, 869 n.308 (1992) (discussing studies).

143. FED. R. CIV. P. 11(c)(2).

144. MODEL CODE DR 7-102(A)(2); MODEL RULES Rule 3.1. The Code also bans actions when a lawyer "knows or when it is obvious that such action would serve merely to harass or maliciously injure another." MODEL CODE DR 7-102(A)(1). The Model Rules require lawyers to "make reasonable efforts to expedite litigation consistent with the interests of the client." MODEL RULES Rule 3.2.

145. GEOFFREY HAZARD JR. & SUSAN P. KONIAK, *THE LAW AND ETHICS OF LAWYERING* 428 (1990).

sanctions that courts generally impose are insubstantial in comparison with the benefits that lawyers or clients gain from abusive tactics.

As in other regulatory contexts, societal and professional interests in curbing such abuses are not coextensive. Most attorneys' primary concern is the avoidance of unwarranted sanctions. Ineffectual penalties are of less concern, because lawyers often welcome the billable hours necessary to respond to opponents' vexatious proceedings. By contrast, the public has a stronger interest in reducing unnecessary legal expenses. From a societal vantage, current enforcement structures provide too much deterrence for lawyers who cannot afford to risk sanctions, and too little for lawyers and litigants who can. The most recent Rule 11 amendments speak only to the first problem. Indeed, returning to a non-mandatory sanctioning framework may exacerbate the second by further weakening deterrence. A significant curtailment of penalty structures may also be premature. The major changes in Rule 11 standards are still relatively recent, and the accumulation of appellate precedent could ultimately prove sufficient to cope with most current inconsistencies and excesses.

In the interim, an alternative approach would be to strengthen penalty options to reach those most impervious to modest fines, while exempting those most vulnerable to arbitrary enforcement. For example, some commentators have recommended making monetary sanctions unavailable against plaintiffs suing under one-way fee shifting statutes, such as civil rights or environmental legislation. Such an exemption would recognize the legislature's intent to encourage these claims, and the legal, factual, and economic hurdles that these claimants already face.<sup>146</sup> For cases where enforcement has been inadequate, appropriate responses could include publicizing sanctions more broadly, referring violations to disciplinary agencies, restructuring those agencies' remedial responses, and requiring organizational offenders to institute educational and monitoring programs.<sup>147</sup> More resources must also be available for judicial oversight, not only by trial courts but also by magistrates and special masters.<sup>148</sup>

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146. Wilkins, *supra* note 142, at 886 & n.383, and sources cited therein.

147. The Committee Notes to the Proposed Amendments to Rule 11 list options including bar referrals and participation in educational programs. ABA/BNA MANUAL, *supra* note 23, at 61:177.

148. See Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 436-37 (1982)

## 2. Disclosure Obligations to the Courts

As the preceding discussion suggested, partisan norms too often skew dispute resolution processes. The challenge lies in structuring responses that will accommodate two primary concerns. One is to preserve some measure of confidentiality, candor, and trust in lawyer-client relationships. A second concern is to prevent freeloading. Overreliance on disclosures from an adversary may result in inefficiency and injustice. One party could end up subsidizing both sides of a lawsuit, or neither party might prepare adequately.

These concerns do not, however, justify the current absence of disclosure obligations in most practice contexts.<sup>149</sup> Models for a more balanced approach are readily available. For example, current constitutional and ethical rules require prosecutors to disclose exculpatory evidence.<sup>150</sup> So too, Model Rule 3.3 mandates that in *ex parte* proceedings, a lawyer must "inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse."<sup>151</sup> Neither of these rules has had the debilitating effects that critics of disclosure obligations typically predict.

Early drafts of the Model Rules suggest other possible approaches. Initial provisions would have prohibited lawyers from: initiating actions unless a lawyer acting in good faith would conclude that there is a reasonable basis for doing so; offering evi-

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(evaluating strategies that delegate some of the courts' managerial power to magistrates).

149. The Code provides that a lawyer shall not "[c]onceal or knowingly fail to disclose that which he is required by law to reveal," and shall not "[k]nowingly make a false statement of law or fact." MODEL CODE DR 7-102(A). Similarly, the Model Rules prohibits lawyers from making a "false statement of material fact or law to a tribunal," and from failing "to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client." MODEL RULES Rule 3.3(a).

A small step toward increased disclosure responsibilities is reflected in a recent amendment to Rule 26 of the Federal Rules of Civil Procedure; it requires litigants to exchange certain information without waiting for discovery requests. Such information includes the names and identities of individuals who are likely to have significant information regarding any claim or defense, a description of any documents likely to bear significantly on these issues, and information regarding any damages claimed and insurance coverage. For discussion, see COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, JUDICIAL CONFERENCE OF THE UNITED STATES, PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE AND THE FEDERAL RULES OF EVIDENCE 14-15 (1991). Significant changes in partisan norms will, however, require broader changes such as those discussed *infra* text accompanying notes 150-58.

150. *Brady v. Maryland*, 373 U.S. 83 (1963); MODEL CODE DR 7-103(B); MODEL RULES Rule 3.8(d).

151. MODEL RULES Rule 3.3(d).

dence, without suitable exploration, that the lawyer knows is substantially misleading; and failing to disclose adverse facts to a tribunal when disclosure would probably have a substantial effect on the determination of a material issue.<sup>152</sup> Early draft proposals also would have given lawyers discretion to disclose favorable evidence to an opposing party and would have obligated them to correct manifest misapprehensions of fact resulting from their own or their clients' previous representations.<sup>153</sup> If enacted and enforced, such rules would help give lawyers' roles as officers of the court more than rhetorical content.

### 3. Disclosure Obligations to Third Parties

There are, of course, limits to how much disclosure of client confidences we can realistically expect from lawyers whose livelihood often depends on client satisfaction. Yet as prior discussion suggested, we have by no means approached those limits. The merits of specific proposals have been explored at length elsewhere and need not be rehearsed here. What bears consideration are simply directions for reform. Where lawyers know or reasonably should know that illegal client conduct poses a threat of death or serious bodily injury, they should have mandatory disclosure obligations comparable to those governing other professions.<sup>154</sup> Where lawyers know or reasonably should know that their assistance has facilitated criminal or fraudulent conduct, they should have to take reasonable remedial measures, including revelation of confidential information to victims or to regulatory agencies. And where attorneys representing organizations learn of illegal conduct that the organization's highest authority is unwilling to correct, they should be required to make disclosures necessary to serve the organization's best interest or to prevent serious third-party inju-

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152. *Id.* Rule 3.1(d) & cmt.

153. *Id.* Rule 4.2 & cmt.

154. For whistleblowing obligations for medical professionals, see *Tarasoff v. Regents of the Univ. of California*, 551 P.2d 334 (1976); Vanessa Merton, *Confidentiality and the "Dangerous" Patient: Implications of Tarasoff for Psychiatrists and Lawyers*, 31 EMORY L.J. 263 (1982). For engineers, see the 1974 *Code of Ethics for Engineers of the Engineer's Council for Professional Development* [hereinafter *ECPD*], which provides that: "Should the Engineers' professional judgment be overruled under circumstances where the safety, health, and welfare of the public are endangered, the Engineers shall inform their clients or employers of possible consequences and notify other proper authority of the situation, as may be appropriate." *ECPD* Canon 1, Guideline 1.c, *quoted in* John Kultgen, *The Ideological Use of Professional Codes*, in *ETHICAL ISSUES IN PROFESSIONAL LIFE* 411, 415 (Joan C. Callahan ed., 1988).

ries.<sup>155</sup> Standards of knowledge should be objective; liability rules should not encourage selective ignorance in contexts suggesting a need for investigation.

These mandatory disclosure requirements should also be accompanied by discretionary provisions. Their objective should be to encourage revelation of conduct posing severe risks to third parties. In areas where regulatory standards have not caught up to demonstrable hazards, protection for innocent victims should be an option for all responsible professionals, including lawyers.

Establishing such disclosure standards will require initiatives along several dimensions. Most obviously, we need to alter, supersede, or supplement bar ethical codes. Parallel changes are necessary in substantive laws governing third-party liability. A clear target for reversal is the approach reflected in a leading federal appellate decision, *Schatz v. Rosenberg*.<sup>156</sup> There, defrauded sellers relied on a financial statement containing material misstatements that the buyer's law firm had drafted. When the buyer declared bankruptcy, the sellers sued the firm and the Fourth Circuit affirmed dismissal of their complaint. In the court's view, lawyers should have no liability to third parties in the absence of specific intent to defraud. This decision stands in sharp contrast to recent cases involving other professionals, who are increasingly held accountable for conscious avoidance of facts indicating fraud.<sup>157</sup> If we are serious about creating market incentives for morality, the standard for attorneys should be no lower; a small but growing number of courts have held as much.<sup>158</sup>

A related strategy is to expand compulsory reporting obligations for all employees, including lawyers, who become aware of unsafe

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155. This was the proposal put forth in earlier drafts of the Model Rules of Professional Conduct and enacted in some states. See Stephen Gillers, *Model Rule 1.13(c) Gives the Wrong Answer to the Question of Corporate Counsel Disclosure*, 1 GEO. J. LEGAL ETHICS 289, 291-92 (1987). For a critical review of current disclosure rules, see *id.*; Stephen Gillers, *Lawyers' Silence Wrong*, L.A. DAILY J., Feb. 16, 1983, at 4.

156. 943 F.2d 485 (4th Cir. 1991), *cert. denied*, 112 S. Ct. 1475 (1992); see also *Barker v. Henderson*, Franklin, Stormes & Holt, 797 F.2d 490, 497 (7th Cir. 1986) ("[A]n award of damages under the securities law is not the way to blaze the trail toward improved ethical standards in the legal and accounting professions.").

157. John M. Freeman & Nathan M. Crystal, *Scienter in Professional Liability Cases*, 42 S.C. L. REV. 783, 852-55 (1991); Rhode, *supra* note 110, at 619-21.

158. See *FDIC v. O'Melveny & Meyers*, 969 F.2d 744, 748-49 (9th Cir. 1992) (under California law, attorney owes duty of care to investors as well as to client with respect to fraud by insiders); *Molecular Technology Corp. v. Valentine*, 925 F.2d 910 (6th Cir. 1991) (Michigan law imposes duty on lawyers to investors who rely on information).

conditions or illegal activity in certain high-risk contexts. More attention should focus on the need for such affirmative disclosure requirements in regulatory settings where abuses have been particularly likely or difficult to remedy, such as those involving banking, environmental, and safety concerns.

Given the demonstrable inadequacies and inconsistencies in state oversight structures, administrative agencies should also assert greater authority to discipline lawyers who practice before them.<sup>159</sup> Where agencies lack such power, state and federal legislation should authorize its exercise, subject to due process constraints.<sup>160</sup> Sanctions should be flexible and should include a range of proactive remedies, such as requiring firms to establish internal education and monitoring structures.

#### 4. Fee Structures

Changing partisan norms will require more than changes in formal rules and liability structures; it will also depend on changes in billing practices. As noted earlier, hourly fee structures can encourage both overrepresentation and underrepresentation of client interests. In a time-based billing system, strategies that prolong proceedings almost always benefit the lawyer, only sometimes benefit the client, and even less frequently benefit the public. The problem is exacerbated by unrealistic billable hour requirements and undemanding regulatory structures.

At an increasing number of firms, annual billable hour requirements exceed 2000 hours, and the additional work required to generate billable time makes for unduly demanding schedules. Experts generally agree that the hourly minimums at many law firms are unattainable without making "very liberal allowances" for the way in which time is recorded.<sup>161</sup> Similar allowances are often made in assessing clients' "needs" and staffing their cases. Policing through normal market mechanisms is not always effective because consumers lack information about how best to achieve certain objectives,

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159. See Robert W. Emerson, *Rule 2(e) Revisited: SEC Disciplining of Attorneys Since In re Carter*, 29 AM. BUS. L.J. 155, 208, 264 (1991) (recommending "that the SEC and securities bar develop a disciplinary formula that moves away from adjudication by a prosecutorial agency without sacrificing procedures to remove bad or incompetent attorneys").

160. Of federal agencies with disciplinary rules, the SEC is the only one that uses its rule routinely. *Id.* at 234, 237 n.384. For a discussion of the Model Rules of Federal Agency Discipline, see *id.* at 256-60.

161. Ross, *supra* note 44, at 14.

how much time a given task usually requires, how much time their attorney actually spends, and how cost effective the services are.

Among bar leaders, most responses to these problems appear obvious but unpalatable. One strategy is to reduce annual billing requirements to levels that do not invite meter running or padding. Although this suggestion is typically dismissed as financially unrealistic if not ruinous, it bears note who is doing the dismissing. The partners who benefit from 2000 hour demands generally earn many times the national average for lawyers.<sup>162</sup> If these partners' incomes were halved, they would still remain among the nation's highest earners. Those who would benefit from more humane expectations of billable hours constitute a much broader group. It includes attorneys who are reluctant to fudge, yet who cannot honestly fulfill current requirements without compromising family, pro bono, or other commitments. Conventional wisdom just a few decades ago was that lawyers could not reasonably expect to charge for more than 1200 to 1500 hours per year. What has not changed is the number of hours in a day.<sup>163</sup> Additional beneficiaries of more realistic billing requirements would be clients who want to minimize unnecessary or unproductive services by beleaguered attorneys blearily "going through the motions."<sup>164</sup>

Although such constituencies do not make natural allies, each independently could exercise greater leverage. Entry-level lawyers are becoming increasingly sensitive to quality of life issues. If more talented applicants and associates voted with their feet, more firms would likely respond. Overbilling would also decline if clients, trial courts, and independent audit services continued recent trends towards close monitoring and comparison fee shopping.<sup>165</sup> Such in-

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162. *The Lawyers Almanac* 35, 36 (1993); *Fiscal Rewards of the Practice*, NAT'L L.J., March 26, 1990; *The Man Law 40: Profits Per Partner*, MANHATTAN LAW., July-Aug. 1991, at 28, 31.

163. James Robertson, *The Beginning of the End of the Billable Hour?*, WASH. LAW., 1991, July/August at 7, 7 (quoting Eugene C. Gerhart, *The Art of Billing Clients*, 1 LAW OFFICE ECON. & MGMT. 29, 34 (1960)).

164. Geoffrey C. Hazard, *Ethics*, NAT'L L.J., Feb. 17, 1992, at 19, 20. As Hazard notes, "[n]o group can get serious mental work out of its members" at rates above 2000 hours a year. *Id.*; see also Carrie Menkel-Meadow, *Culture Clash in the Quality of Life in the Law: Changes in the Economics, Diversification and Organization of Lawyering* 44 CASE W. RES. L. REV. 621 (1994).

165. For examples of judicial policing, see David Margolick, *It's the 90s Counselor: Superfluous Fees Denied*, N.Y. TIMES, Aug. 14, 1992, at B9. For legal audit services, see Nancy Rutter, *The Law Business*, CAL. LAW., May 1991, at 26; Sharon Walsh, *Lawyers' Clients Get a Little Cross Examining Bills; Overcharges, Questionable Fees Come Under Increased Scrutiny*, WASH. POST, June 8, 1992, at F1. For corporate oversight, see Alberta



creased scrutiny could also encourage alternative forms of task-based billing that include incentives for efficient services.<sup>166</sup>

Of course, task-based billing can create its own set of problems if the fees are set at unrealistic levels and if controls on competence are weak. This is, in essence, the problem in the criminal contexts described earlier. Here the solution is again obvious but unpalatable; increased resources are necessary to raise fees and reduce caseloads. Yet public officials generally win far more support by promising to be tough on criminals than to subsidize their defense. Still, as even conservatives such as federal judge Frank Easterbrook have argued, a society that professes the "inestimable value of liberty," and that is willing to pay more than \$20,000 a year for each individual that it incarcerates, should be prepared to pay more than \$250 to determine whether imprisonment is in fact justifiable.<sup>167</sup> According to many commentators, if this position is unpopular with the electorate, that is all the more reason for non-elected judges to require adequate appropriations. Just as we have depended on courts to set threshold standards for prisons, we need them to set realistic benchmarks for criminal defense fees and caseloads.<sup>168</sup>

Neither increased resources nor greater attorney-client control will, of course, address all of the conflicts of interest noted above. Even with more adequate compensation and realistic caseloads, appointed counsel will often have personal and professional reasons

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I. Cook, *Hourly Billing: A Thing of the Past?*, in BEYOND THE BILLABLE HOUR: AN ANTHOLOGY OF ALTERNATIVE BILLING METHODS 31 (Richard C. Reed ed., 1989) [hereinafter BEYOND THE BILLABLE HOUR]; Shawn Tully, *How to Cut Those Legal Costs*, FORTUNE, Sept. 21, 1992, at 2.

166. See Edward P. Liebensperger, *A Proposal for Improving Litigation Team Management: Task-Based Billing*, in BEYOND THE BILLABLE HOUR, *supra* note 165, at 153; Jesse D. Miller, *Pros and Cons of Alternative Fee Structures—Beyond Hourly Fees*, in BEYOND THE BILLABLE HOUR, *supra* note 165, at 85, 88; Carrie Menkel-Meadow, *supra* note 164.

167. Frank H. Easterbrook, *Plea Bargaining as Compromise*, 101 YALE L.J., 1969, 1974 (1992).

168. See *Makemson v. Martin County*, 491 So.2d 1109 (Fla. 1986), *cert. denied*, 479 U.S. 1043 (1987) (holding that statutory maximum fees violated rights to effective assistance of counsel in cases involving extraordinary circumstances). Other courts that doubt their authority to appropriate public funds have refused to hear cases in which counsel is inadequately compensated or have refused to require counsel to accept appointments. See *State ex rel. Wolff v. Ruddy*, 617 S.W.2d 64 (Mo. 1981) (en banc), *cert. denied*, 454 U.S. 1142 (1982) (holding that if funds are not available, the accused should be discharged); see also *Bradshaw v. Ball*, 487 S.W.2d 294 (Ky. 1972) (allowing counsel to refuse to accept court appointments to indigent defendants); *State ex rel. Partain v. Oakley*, 227 S.E.2d 314 (W. Va. 1976).

to avoid trial. And retained counsel who charge flat fees will still have incentives to plea bargain cases that defendants might prefer to litigate. Providing adequate client protection will require more responsive civil liability and bar disciplinary systems, and more rigorous standards for assessing effective assistance of counsel.

Greater oversight is also necessary concerning contingent fees. As noted earlier, in claims with low or modest stakes, contingent-fee lawyers often have inadequate incentives to prepare a case thoroughly and to hold out for the highest possible settlement. Conversely, in high-stakes cases, after lawyers have spent substantial time in preparation, they may be more inclined to gamble for a large recovery than clients with limited resources and substantial needs. A related problem is that an attorney's total fee bears no necessary relationship to the amount of work performed or to the risk actually assumed. In cases with uncontested facts and large damages, a standard one-third recovery will provide windfalls for counsel. Although lawyers frequently defend such recoveries as essential to subsidize other cases with higher risks, it does not appear that undue risks are taken frequently enough to justify current premiums.<sup>169</sup>

How best to respond to these problems is less obvious than with other fee-related issues. Some jurisdictions have attempted to prevent lawyer windfalls through a formula granting them declining shares of net recoveries—for example, 50% of the first \$100,000 and 10% of amounts over \$100,000.<sup>170</sup> This approach, however, risks overcompensating small cases and deterring lawyers from accepting large complex claims. Many experts therefore prefer either case-by-case judicial oversight or more complicated formulas tied both to the amount of time expended and the recovery received.<sup>171</sup>

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169. LESTER BRICKMAN ET AL., RETHINKING CONTINGENCY FEES 20-23 (1994); RHODE & LUBAN, *supra* note 24, at 772; Lester Brickman, *Contingent Fees Without Contingencies: Hamlet Without the Prince of Denmark?*, 37 U.C.L.A. L. REV. 29, 99 (1989) (proposing that contingency fees should only be permissible if there is a realistic possibility of no recovery).

170. Florida Bar re Amendment to the Code of Professional Responsibility, 494 So. 2d 960, 963 (Fla. 1986); Cal. Bus. & Prof. Code § 6146 (West 1990); *see also* Note, *New Jersey's Maximum Contingent Fee Schedule: The Validity of Rule 1: 21-7*, 5 RUT.-CAM. L.J. 534 (1974).

171. *See* Brickman, *supra* note 169 (arguing for the inclusion of a risk factor and different rates for trial and settlement); Clermont & Currihan, *supra* note 43, at 537-50. A recent proposal developed under the auspices of the Manhattan Institute and endorsed by a consortium of prominent bar leaders, would provide that in personal injury cases: (1)

However this issue is resolved, contingency agreements, like other fee-related practices, require more stringent regulatory standards and more accessible dispute resolution procedures. Current rules are overly deferential to professional interests. The Model Code prohibits "clearly excessive" fees, and defines them from the perspective of a "lawyer of ordinary prudence" who is "left with a definite and firm conviction that the fee is in excess of a reasonable fee."<sup>172</sup> The choice of a "reasonable lawyer" rather than the customary "reasonable person" is particularly instructive, given that attorneys and consumers have quite different perceptions concerning the fairness of lawyers' charges.<sup>173</sup> Although the Model Rules require "reasonable" fees, reported cases do not suggest that the change in terminology has led to significant changes in outcomes.<sup>174</sup> Courts are reluctant to second-guess fee agreements, and clients are likely to get relief only in egregious cases.<sup>175</sup>

Such relief is usually difficult and expensive to attain, and for many clients the costs are prohibitive. Most bar disciplinary systems decline jurisdiction over fee-related disputes. And although almost all states now offer fee arbitration programs, the vast majority of these programs are voluntary.<sup>176</sup> After bar opposition, drafters of the Model Rules deleted proposed requirements that lawyers participate in fee arbitration. Predictably, the attorneys most likely to

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contingency fees could not be charged against settlement offers made prior to plaintiffs' retention of counsel; (2) defendants would have an opportunity to make a settlement offer within 60 days after demand of such an offer, and if accepted by the plaintiffs, fees would be capped at 10% of the first \$100,000 and 5% of any greater amounts; (3) demands and offers would need to be accompanied by discoverable information to assist evaluation of the claim; (4) when plaintiffs reject early offers, contingent fees could only be charged against net recoveries in excess of such offers; and (5) if defendants make no offer within 60 days of demand, contingency fee contracts would be unaffected by the proposal. BRICKMAN ET AL., *supra* note 169, at 27-28.

172. MODEL CODE DR 2-106(B). The California Rules prohibit only unconscionable fees. CALIFORNIA RULES OF PROFESSIONAL CONDUCT Rule 4-200(A) (1992).

173. Less than one-third of all attorneys polled by the *ABA Journal* in the early 1980s believed that legal fees were too high, while an earlier ABA study had found that almost two-thirds of the public believed that most lawyers charged more for their services than they were worth. *Compare Law Poll: Fees About Right, Lawyers Say*, 68 A.B.A. J. 1562 (1982) with BARBARA A. CURRAN & FRANCIS O. SPALDING, *THE LEGAL NEEDS OF THE PUBLIC* 96 (1974).

174. MODEL RULES Rule 1.5.

175. See RHODE & LUBAN, *supra* note 24, at 751-67. For a recent sampling of unremedied abuses, see City of N.Y. Dep't of Consumer Affairs, *supra* note 42.

176. In the remaining 10% of jurisdictions that offer mandatory programs, de novo judicial review is available. See Lester Brickman, *Attorney-Client Fee Arbitration: A Dissenting View*, 1990 UTAH L. REV. 277, 278 n.4 (1990).

commit abuses are least likely to cooperate in their remedy. Arbitration programs are limited in other respects; most are inadequately publicized and will not consider performance-related issues that underlie many billing disputes.<sup>177</sup> A more fundamental problem, which contributes to all the others, is that the legal profession controls the arbitration structure, constitutes a majority of its decision makers, and determines the selection of lay representatives. On the whole, these nonlawyer arbiters have been more sympathetic to attorney than to consumer concerns.<sup>178</sup>

Appropriate responses to these inadequacies are straightforward. Courts should hold lawyers to more exacting fiduciary standards. As noted earlier, fee arbitration systems should be mandatory, should cover performance issues, and should be publicized through media outreach and disclosure requirements.<sup>179</sup> Nonlawyer arbiters should constitute a majority of decision makers and should be selected and trained in ways that insure accountability to the public rather than the profession. The chance of obtaining and enforcing all of these reforms is likely to be greater if control over the process rests with an agency independent of the organized bar.

### 5. Class Actions

A final area where greater judicial oversight is appropriate involves class action litigation. In many contexts, the interests of some class members run counter to those that counsel wishes to represent for the class as a whole.<sup>180</sup> Financial conflicts can also arise between clients' objectives, which generally lie in obtaining the best possible recovery for the class, and attorneys' objectives, which may also include entitlement to statutory fee awards or to a percentage fee that maximizes the return on their time.<sup>181</sup>

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177. Richard Herbert, *Settling Disputes Over Lawyers' Bills*, THE LEGAL REFORMER, Oct.-Dec. 1989, at 16-17.

178. Robert Egelko, *Arbitrating Fee Disputes: Mandatory Fee Arbitration May Worry Lawyers, But It's Not All Bad News*, CAL. LAW., Jan. 1985, at 21, 22.

179. For example, bar ethical codes could require that lawyers indicate the availability of arbitration in written fee agreements or in notices issued prior to instituting fee collection proceedings. See Herbert, *supra* note 177, at 17-20. The New York Department of Consumer Affairs also proposed, and the New York Court of Appeals adopted, rules requiring lawyers to submit to arbitration at clients' requests, to prepare written retainer agreements specifying fee-related terms in plain language, and to provide a standardized bill of rights including information on complaint channels. N.Y. Dep't of Consumer Affairs, *supra* note 42.

180. See Bell, *supra* note 52; Rhode *supra* note 52 (discussing the conflict of interest among individual class members); sources cited *infra* note 181.

181. See John Coffee, *Balancing Fairness and Efficiency in the Large Class Actions*, 54

Representation may prove inadequate under such circumstances because class members, opposing parties, and trial judges all lack sufficient information or incentives to raise the issue. Potential dissenters are frequently unaware of likely outcomes until meaningful involvement is too late. Those who are more knowledgeable may have insufficient stakes or resources to complain. Opposing parties are not always able to discover the extent of conflict within a class. Nor will they typically be interested in drawing the problem to a court's attention if the likely result would be to multiply counsel. That is particularly true where opponents could be liable for prevailing parties' attorneys' fees under state or federal statutes.

Although procedural rules and due process standards require judges to ensure adequate class representation, practical constraints often discourage active oversight.<sup>182</sup> In many cases, finding class representatives or their counsel inadequate will not terminate proceedings; it will prolong them. From the perspective of an overburdened trial court, the prospect of adding new attorneys or subdividing classes is often undesirable. More is seldom merrier. Multiple representation generally multiplies problems. More parties mean more papers, more scheduling difficulties, and more potential for objection to any given ruling or settlement proposal.<sup>183</sup> So too, monitoring of class representation is often limited to the certification stage, when the range and intensity of conflict is not yet apparent.

In response to these problems, commentators have proposed a number of partial solutions. One is to require courts to make a record concerning their responsiveness to class conflicts. To assist judicial determinations, class counsel could submit statements detailing contacts with class members, and attorneys' fee awards could be structured to create greater incentives for class members' involvement. Appointment of separate counsel, or guardians ad litem who represent absent class members at the settlement phase of litigation, could also become more standard responses to potential conflicts.<sup>184</sup> Such procedural checks and balances, while not an

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U. CHI. L. REV. 877 (1987); Mary K. Kane, *Of Carrots and Sticks: Evaluating the Role of the Class Action Lawyer*, 66 TEX. L. REV. 385 (1987); Jonathan Macy & Geoffrey Miller, *The Plaintiff's Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1 (1991).

182. See, e.g., FED. R. CIV. P. 23a(3)-(4) (requiring that class representatives "fairly and equally protect the interests of their class"); Rhode, *supra* note 52, at 1191-92.

183. Rhode, *supra* note 52, at 1219.

184. See John Coffee, *Rethinking Class Action: A Policy Primer on Reform*, 62 IND. L.J.

entirely adequate approach, could at least mitigate problems of underrepresentation for some vulnerable constituencies.

### III. PROCEDURAL ALTERNATIVES AND MARKET INCENTIVES

Since problems of professionalism are at least partly driven by market forces, more systematic efforts at market intervention are necessary. And since the market is itself partly responsive to procedural structures, more carefully tailored dispute resolution alternatives are equally important. To compensate for overrepresentation of client interests, we need initiatives that will either reduce resource inequalities or reduce their effect on outcomes. To counteract underrepresentation of client concerns, we need strategies that will increase competition among service providers and decrease information barriers among consumers. Although both sets of strategies require more extended analysis than is possible here, it is important at least to identify the options available and the research that would be necessary to choose wisely among them.

#### A. *Alternative Dispute Resolution and Procedural Reform*

Many problems of over- and underrepresentation would arise less frequently under alternative methods of dispute resolution [ADR] or under simplified procedures that reduce dependence on lawyers and that restrict opportunities for partisan abuses. Yet such informality comes at a cost, which varies widely according to the nature of the procedure and the context of its implementation.<sup>185</sup> The safest generalization for reform strategies is the need to avoid overgeneralizing.

As originally conceived, alternative dispute resolution and procedural simplifications sought to address many of the problems in adversarial approaches noted earlier: undue costs, delays, and contentiousness; inequalities in access and results; and lack of client control over the process. Yet, as quickly became apparent, these concerns often pushed in different directions. And some initiatives have been co-opted by the very forces that proponents sought to challenge.<sup>186</sup>

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625 (1987); Macy and Miller, *supra* note 181; Rhode, *supra* note 52; see also Nancy Morowitz, *Bargaining, Class Representation, and Fairness*, 54 OHIO ST. L. J. 1 (1993) (discussing need for clearer standards to accommodate conflicting interests among class members); Jack B. Weinstein, *Ethical Dilemmas in Mass Tort Litigation*, 88 NW. U.L. REV. 470, 496-98 (1994) (discussing strategies to promote greater lawyer accountability).

185. STEPHEN B. GOLDBERG ET AL., *DISPUTE RESOLUTION* 8-9 (1985).

186. Carrie Menkel-Meadow, *Pursuing Settlement in an Adversary Culture: A Tale of*

A cottage industry of criticism has identified the gaps between ADR's promise and performance. For example, compulsory but non-binding court-annexed programs such as mediation or summary trials can amplify rather than reduce expenses by adding one more stage for tactical maneuvers. Workshops designed to assist parties "'win' at ADR" detail the opportunities.<sup>187</sup>

Both voluntary and mandatory programs have been criticized as too available or not available enough. Commentators taking the latter view note that options such as rent-a-judge, minitrials, and arbitration are usually accessible only to those who can afford them. Such a market structure institutionalizes "legal apartheid"—convenient, speedy justice for the "haves," and delays and inefficiencies for the "have nots."<sup>188</sup> Creation of a two-track structure may also reduce pressure to reform the system that makes such alternatives necessary. By contrast, other critics charge that informal remedies are too often forced on disempowered parties as a form of second class justice. In contexts of resource disparities, the absence of neutral adjudicators and procedural guarantees can skew the balance further. One case in point involved a landlord-tenant court in the South Bronx, where renters lost tactical advantages under a streamlined system.<sup>189</sup> So too, mediation between parties of unequal power can often reinforce their inequality; research on custody and domestic violence programs finds that women negotiate away rights that should be non-negotiable.<sup>190</sup> Informal processes geared toward private settlement may also undervalue societal interests in having publicly accountable officials implement publicly acceptable standards.<sup>191</sup>

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*Innovation Co-opted or "The Law of ADR,"* 19 FLA. ST. U. L. REV. 1, 3 (1991).

187. *Id.*; see also Craig A. McEwen, *Pursuing Problem Solving or Predictive Settlement*, 19 FLA. ST. U. L. REV. 77, 86, n.36 (1991) (noting that mandatory mediation in divorce cases has increased legal fees since lawyers routinely participate).

188. Robert Gnaizda, *Rent a Judge: Secret Justice for the Privileged Few*, 66 JUDICATURE 6, 11 (1982).

189. Mark M. Lazerson, *In the Halls of Justice, the Only Justice Is in the Halls*, in 1 THE POLITICS OF INFORMAL JUSTICE 119, 128-60 (Richard L. Abel ed., 1982).

190. For example, battered wives may agree to avoid nagging in exchange for their husbands' promises to refrain from physical assaults. Lisa G. Lerman, *Mediation of Wife Abuse Cases: The Adverse Impact of Informal Dispute Resolution on Women*, 7 HARV. WOMEN'S L. J. 56, 57 (1984). For risks to women in other contexts, see Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L. J. 1545 (1991); Janet Rifkin, *Mediation from a Feminist Perspective: Promise and Problems* 2 LAW & INEQ. J. 21 (1984); see also Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359.

191. Owen M. Fiss, *Against Settlement*, 93 YALE L. J. 1073, 1085-87 (1984).

Yet such critiques have themselves prompted an equally powerful set of rejoinders. As they suggest, the impact of alternative dispute resolution depends heavily on context. In the housing court example, tenants were able to exploit procedural options only because of certain contingencies, such as the burden of proof under applicable eviction statutes and the availability of legal services attorneys.<sup>192</sup> Where evidentiary burdens and professional assistance are distributed differently, the tradeoffs are also different.

Thus, the evaluation of procedural alternatives cannot proceed in the abstract.<sup>193</sup> Too often, critics of informal dispute resolution processes compare them to an idealized image of adjudication. Yet before denouncing such initiatives as second class justice, we need to know whether first class is likely to be available, and on what terms. In many respects, the current system already institutionalizes inequality. And it is surely relevant, if not dispositive, that surveyed participants generally prefer informal procedures to current adversarial alternatives.<sup>194</sup>

Despite an increasing volume of commentary, systematic information is lacking on crucial issues. To what extent and under what circumstances do various procedural alternatives reduce the price of partisanship, in terms of harassment, delay, distortion, nondisclosure, and so forth? What structures are most likely to reduce costs, increase party satisfaction, mitigate lawyer-client conflicts, and prevent exploitation of less powerful parties? How do the answers to these questions vary according to the social situation of the participants and the nature of the interests at issue? What general principles would be helpful in structuring procedural alternatives, evaluating their outcomes, and monitoring the conduct of lawyers?

Further innovation and evaluation are equally desirable for procedural reforms concerning uncontested matters. Many nations have far more streamlined systems for handling needs involving

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192. William H. Simon, *Legal Informality and Redistributive Politics*, 19 CLEARINGHOUSE REV. 384, 385 (1985).

193. Deborah L. Rhode, *The Rhetoric of Professional Reform*, 45 MD. L. REV. 274 (1986).

194. JANE ADLER, *SIMPLE JUSTICE: HOW LITIGATORS FARE IN THE PITTSBURGH LAW COURT ARBITRATION PROGRAM* 60-85, 83-96 (1983); Mary Duryee, *Mandatory Court Mediation Demographic Summary and Consumer Evaluation of One Court Service*, 30 FAM. & CONCILIATION CTS. REV. 260, 265 (1992); Craig A. McEwen & Richard J. Maiman, *Small Claims Mediation in Maine: An Empirical Assessment*, 33 ME. L. REV. 237, 241 (1981); Alan Slater et al., *Client Satisfaction Survey: A Consumer Evaluation of Mediation and Investigative Services*, 30 FAM. & CONCILIATION CTS. REV. 252 (April 1992); see also Rhode, *supra* note 193, at 286 & n.53, and sources cited therein.



simple estates, divorces, auto collisions, landlord-tenant disputes, and so forth.<sup>195</sup> Structural reforms and administrative support for pro se claimants could reduce current temptations among overqualified lawyers to overcharge for routine work.

### B. *Equalizing Resources*

Although, as noted earlier, full equalization of resources is an unrealistic aspiration, we can address some of the most troubling disparities by tinkering at margins of the current market.

#### 1. Fee Shifting

The American rule that parties generally pay their own expenses is a relatively recent and highly exceptional practice.<sup>196</sup> In almost every other country, courts routinely award legal fees as well as costs to a prevailing party. Most evidence suggests that similar practices failed to survive in America largely out of animosity toward lawyers.<sup>197</sup> Ironically enough, some opponents of the current American rule want to replace it for the same reason.

The alternatives involve award of fees to any prevailing party (the English "two-way" fee shifting rule) or only to a successful plaintiff or defendant (one-way fee shifting approaches). Either rule can apply across the board (as with the English rule); only for certain types of actions (such as civil rights); only in response to certain conduct (such as sanctions for frivolous, unreasonable, or bad faith claims); or only in a court's discretion under specified circumstances. In this country, judges traditionally have been reluctant to exercise discretion to award fees, and legislatures generally have mandated such awards only for plaintiffs in certain actions that are thought to deserve special encouragement.<sup>198</sup> Proponents of fee shifting maintain that its wider use would help deter

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195. See Deborah L. Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 STAN. L. REV. 1, 89-90 (1981). See generally JEFFREY O'CONNELL & ROGER C. HENDERSON, TORT LAW, NO-FAULT AND BEYOND: TEACHING MATERIALS ON COMPENSATION FOR ACCIDENTS AND AILMENTS IN MODERN SOCIETY (1975); Cramton, *supra* note 49.

196. WOLFRAM, *supra* note 78, at 918; Frances K. Zemans, *Fee Shifting and the Implementation of Public Policy*, 47 LAW & CONTEMP. PROBS., Winter 1984, at 187, 188-89.

197. WOLFRAM, *supra* note 78, at 918; John Leubsdorf, *Toward a History of the American Rule on Attorney Fee Recovery*, 47 LAW & CONTEMP. PROBS., Winter 1984, at 9, 12-13.

198. See WOLFRAM, *supra* note 78, at 927; Thomas D. Rowe, Jr., *Predicting the Effects of Attorney Fee Shifting*, 47 LAW & CONTEMP. PROBS., Winter 1984, at 139; Zemans, *supra* note 196, at 209.

nonmeritorious claims and encourage small but valid ones, particularly among parties of limited means.

Opponents of routine fee shifting dispute the latter argument. They argue that the risk of paying two sets of fees would unduly chill meritorious but not clear-cut claims, and would disproportionately deter suits by public interest and other underrepresented groups. In the early 1990s, Vice President Quayle's Council on Competitiveness revived this debate with a call for experimental adoption of a two-way fee shifting system in certain federal diversity cases.<sup>199</sup>

It is by no means clear that any such system would address the ethical problems of greatest concern here. Experts generally conclude that the overall effects of adopting the rule are impossible to predict. Too many complex factors enter the calculus. Results depend on cost-cutting incentives, diverse risk preferences, and varied amounts at stake among both parties and their lawyers.<sup>200</sup> Generalizations from other nations' experience are equally risky. In the United Kingdom, for example, application of the "loser pay" system is far more complicated than the label implies. Only about 40% of individual plaintiffs are in fact potentially liable for their opponents' fees, because of exemptions for claimants receiving legal aid, and because of reliance on legal-expense insurance and other third-party payments (such as from labor unions).<sup>201</sup> If American courts adopted a similar two-way fee shifting rule, comparable exemptions or insurance systems might develop. Indeed, contingent-fee lawyers might themselves underwrite such schemes and thus remove some of the deterrent effect that proponents of reform are seeking to achieve.<sup>202</sup>

As Charles Wolfram notes, the only reasonable general conclu-

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199. Dan Quayle, "Isn't Our Legal System in Need of Reform?," *LEGAL TIMES OF WASHINGTON*, Aug. 19, 1991, at 9.

200. Thomas D. Rowe, Jr., *The Legal Theory of Attorney Fee Shifting: A Critical Overview*, 1982 *DUKE L.J.* 651, 666; see also Ronald Braeutigam et al., *An Economic Analysis of Alternative Fee Shifting Systems*, 47 *LAW & CONTEMP. PROBS.*, Winter 1984, at 173; Charles W. Wolfram, *The Second Set of Players: Lawyers, Fee Shifting, and the Limits of Professional Discipline*, 47 *LAW & CONTEMP. PROBS.*, Winter 1984, at 293 (analyzing the effect of divergent lawyer-client interests and effective lawyer control on fee shifting systems).

201. Herbert B. Kritzer, *The English Experience with the English Rule: How 'Loser Pay' Works, What Difference It Makes, and What Might Happen Here* (July 1992) (Institute for Legal Studies, Madison, Wisconsin, Working Paper, Dispute Resolution Program 11-4).

202. According to one study, the effect of adopting the English approach once insurance schemes developed might be to discourage only speculative cases while encouraging routine claims that are now unprofitable without a fee award. *Id.* at 14-15.

sion about altering fee structures is that any such conclusion should be "viewed with great caution."<sup>203</sup> We also have "no empirical evidence that either the integrity or the efficiency of the judicial process is improved, or indeed affected, by exceptions to the American rule."<sup>204</sup> Before we further expand those exceptions, we should have more systematic evaluations of the state and federal fee shifting rules already in place.<sup>205</sup>

Although currently available evidence suggests little reason to adopt loser pay rules for all cases, it does point up the need for greater redistribution in selected cases. The rationale for one-way prevailing plaintiff fee awards is much stronger than for categorical loser pay systems, at least where plaintiffs are likely to have fewer resources for litigation.<sup>206</sup> Even more compelling is the rationale for more effective sanctions against bad faith conduct.<sup>207</sup>

## 2. Financing Litigation

Another way to reduce resource inequalities is to ease restrictions on financing litigation by lawyers and third parties. The current Code allows attorneys to subsidize litigation costs only when the client remains ultimately responsible.<sup>208</sup> The Model Rules are only slightly more liberal; they permit lawyers to subsidize litigation for indigent clients irrespective of outcome, and authorize advances to other clients with repayment contingent on the outcome of the case.<sup>209</sup> Except in a few jurisdictions, bar ethics provisions do not permit payment of medical and living expenses that would enable clients to withstand pressures for inadequate settlements. Nor have most jurisdictions allowed contingent fees for experts or third party investments in litigation, although a few courts have permitted syndicated lawsuits.<sup>210</sup>

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203. WOLFRAM, *supra* note 78, at 921.

204. Zemans, *supra* note 196, at 194.

205. There are already some 2000 state statutes and over 100 federal statutes providing for one-way fee shifts, and Alaska authorizes two-way shifts. Murray L. Schwartz, *Foreward*, 47 LAW & CONTEMP. PROBS., Winter 1984, at 1, 4; Note, *State Attorney Fee Shifting Statutes: Are We Quietly Repealing the American Rule?*, 47 LAW & CONTEMP. PROBS., Winter 1984, at 321, 323, 337. See generally Rowe, *supra* note 198.

206. Rowe, *supra* note 200, at 679; see also *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 718 (1967) (discussing general justifications for not shifting fees).

207. See *supra* text accompanying notes 106-10.

208. MODEL CODE DR 5-103(B).

209. MODEL RULES Rule 1.8(e).

210. See RHODE & LUBAN, *supra* note 24, at 783 & n.2, and sources cited therein.

These financing restrictions date to medieval prohibitions on champerty and maintenance.<sup>211</sup> The rationale for banning monetary assistance has been rooted in two concerns; the desire to avoid the "strife and contention" of unwarranted litigation,<sup>212</sup> and the desire to minimize lawyer-client conflicts of interest. Yet while acknowledging the force of these concerns, most experts believe that current restrictions sweep too broadly.<sup>213</sup> The risks of conflicts or baseless litigation are precisely the same as those arising from contingent fees. And, as earlier discussion suggested, the best response to such risks is greater regulatory oversight, not categorical prohibitions. Current restrictions on subsidizing litigation are frequently evaded, and understandably so. If strictly enforced, they would "paralyze" entire categories of proceedings, such as class actions and shareholder derivative suits, where no single plaintiff has a sufficient stake to accept liability for expenses.<sup>214</sup> Bans on humanitarian medical and living assistance are more widely observed, and thus more inhumane in effect, particularly for injured claimants lacking health insurance.<sup>215</sup>

Prohibitions on contingent fees for experts raise similar concerns.<sup>216</sup> Such restrictions increase litigation inequalities among already unequal parties. It is, of course, true that giving experts a direct stake in the outcome might enhance their incentives to shade testimony. But much the same incentives are already present, given many witnesses' ongoing business relations with particular lawyers

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211. Under Blackstone's traditional definitions, maintenance is "an officious intermeddling in a suit . . . by maintaining or assisting either party, with money or otherwise, to prosecute or defend it." 4 WILLIAM BLACKSTONE, COMMENTARIES \*134-35. Champerty, "a species of maintenance," is a bargain with a party to divide the fruits of litigation in exchange for subsidizing it. *Id.* at \*135.

212. *Id.*

213. Wolfram, *supra* note 200; see also Cynthia L. Cooper, *Champerty, Anyone?: Modern Investors Are Trying to Sell Shares in Lawsuits*, CAL. LAW., Jan. 1990, at 19.

214. Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1, 98 (1991).

215. See *Louisiana State Bar Ass'n v. Edwins*, 329 So. 2d 437, 446 (La. 1976) ("If an impoverished person is unable to secure subsistence . . . during disability, he may be deprived of the only effective means by which he can wait out the necessary delays that result from litigation to enforce his cause of action."); see also RESTATEMENT OF THE LAW GOVERNING LAWYERS § 48(2)(b) (Tent. Draft No. 4, 1991, cmt. d) (permitting a lawyer to advance a client's living expenses during the pendency of litigation if delay would otherwise cause a settlement to be based on financial hardship rather than on the merits of the claim).

216. See MODEL CODE DR 7-109(C); MODEL RULES Rule 3.4 cmt.

and the frequent practice of not demanding fees from unsuccessful parties.<sup>217</sup> Such sources of bias are often harder to expose on cross examination than contingent fees. Concerns about skewed presentations could be better addressed by other mechanisms, such as greater use of court-appointed independent experts, or more probing assessment of the qualifications of experts who express highly unusual views.<sup>218</sup>

Restrictions on financing litigation also require reassessment. While we may not like the specter of selling shares in lawsuits, we have already permitted as much in consolidated contingent fee class actions, where litigation is financed by consortiums of plaintiffs' counsel.<sup>219</sup> It is not clear why investment in such claims should be limited to lawyers, whose conflicts are in many ways harder to police than those of other potential investors. Until we have better ways to deter tortious conduct, compensate victims, and finance legal services, we ought to permit more innovative mechanisms for underwriting litigation.

### C. *Competition and Information*

For those concerned with institutionalizing ethics, strategies that increase competition are likely to have mixed results. In some contexts, increased pressure to attract and hold business may intensify pressures toward overrepresentation of client interests. Yet such competition, if coupled with greater information about the value of particular services, may also counteract some of the lapses in client loyalty noted earlier. The more we can control undue partisanship through regulatory oversight, and the more we can reduce information barriers through market initiatives, the greater will be the value of competition.

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217. See *Person v. Association of the Bar of New York*, 554 F.2d 534, 539 (2d Cir.), cert. denied, 434 U.S. 924 (1977).

218. See Burton L. Ingraham, *The Ethics of Testimony: Conflicting Views on the Role of the Criminologist as Expert Witness*, in *EXPERT WITNESSES: CRIMINOLOGISTS IN THE COURTROOM* 178, 180-81 (Patrick R. Anderson & L. Thomas Winfree Jr. eds., 1987); Jack B. Weinstein, *Improving Expert Testimony*, 20 U. RICH. L. REV. 473, 489-92 (1986).

219. *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 216 (2d Cir. 1987) (wealthy plaintiffs' attorneys entitled to repayment of funds advanced but not to threefold return on investment); see also PETER H. SCHUCK, *AGENT ORANGE ON TRIAL: MASS TOXIC DISASTERS IN THE COURTS* 120-22, 202-04 (Enlarged ed. 1986); Weinstein, *supra* note 184.

### 1. Information Barriers

Purchasers' ability to evaluate legal services varies widely, and requires equally varied market strategies. Large-scale repeat purchasers may find sufficient assistance through increased use of audit services, competitive bidding, and monitoring by in-house counsel. One-shot or infrequent purchasers have much greater needs for independent sources of information.

Current bar referral programs perform no screening or evaluating functions, and as noted earlier, disciplinary agencies fail to disclose information concerning the vast majority of complaints that do not result in formal investigation or public sanctions. Although group legal services programs often perform some monitoring functions, their growth has been unduly restricted by bar ethical rules, particularly those governing financial investment.<sup>220</sup> Lack of bar cooperation has also prevented efforts to provide centralized consumer directories with substantial price and quality information.<sup>221</sup> The market in legal services would function far more effectively if these constraints were removed and if middle and lower income purchasers had better sources of information about their legal options and choice of lawyers.

Lawyers, individually and collectively, could also help to expand the supply of information through further initiatives. Attorneys could establish or cooperate with rating and referral networks that supplied standardized information concerning cost, competence, client satisfaction, ethical violations and so forth. Disciplinary agencies could do more to publicize sanctions along lines set forth above. Specialized bar associations could continue the trend among some organizations to certify lawyers satisfying special competence standards and to establish selective affiliations of distinguished practitioners.<sup>222</sup> As Robert Gordon and William Simon have ar-

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220. See MODEL CODE DR 2-103; MODEL RULES Rules 5.4, 5.5(b), 7.2, 7.3; ABA Comm. on Professional Ethics and Grievances, Formal Op. 355 (1987). See generally ROGER D. BILLINGS, JR., *PREPAID LEGAL SERVICES* (1981); Alec M. Schwartz, *Prepaid Legal Services: Opening One More Door to Justice*, in *CIVIL JUSTICE: AN AGENDA FOR THE 1990S* 117, 139-40 (1991); WOLFRAM, *supra* note 78, at 915 (arguing that bar's hostility to group plans is difficult to understand except as arising from parochial interests of lawyers who fear competitive disadvantage); David A. Kaplan, *Want to Invest in a Law Firm?*, NAT'L L.J., Jan. 19, 1987, at 1.

221. An attempt by Consumers Union to publish such a directory in Virginia is a case in point. See RHODE & LUBAN, *supra* note 24, at 682.

222. Organizations that certify lawyers include the National Board of Trial Attorneys, American Bankruptcy Institute, and the National Organization of Social Security Claimants'

gued, such organizations could help create a more efficient market in reputation and a more effective reward structure for ethical performance.

Finally, the bar could sponsor systematic research on the impact of state specialization and certification programs. Despite the growing support for such plans, their overall effects on price, quality, or client satisfaction remain unclear. More adequate data could lay the foundations for more effective policies on the use of formal specialty credentials in an era of increasing *de facto* specialization.<sup>223</sup>

## 2. Nonlawyer Competition

Traditionally, the legal profession has asserted inherent authority to define the practice of law, to limit that practice to lawyers, and thus to determine the scope of its own monopoly. Repeatedly, bar leaders have insisted that it is consumers, not attorneys, who suffer from lay competition, and that the "fight to stop it is the public fight."<sup>224</sup> If so, it is time for the profession to relinquish control over the war effort. On the relatively few occasions when its opinion has been solicited, the public has strongly supported greater access to legal services by nonlawyers.<sup>225</sup> So too, experts on occupational licensing almost universally believe that reducing barriers to competition would promote more cost-effective delivery of routine assistance.<sup>226</sup>

Prevailing unauthorized practice rules prohibit a sweeping array of commercial activity.<sup>227</sup> Although exceptions to these prohibitions have been increasing and enforcement has been declining, the

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Representatives. Don J. DeBenedictis, *House of Delegates*, A.B.A. J., Apr. 1993, at 114.

223. RHODE & LUBAN, *supra* note 24, at 686-87.

224. American Bar Association, *National Conference on the Unauthorized Practice of Law* 101 (1962) (remarks of former ABA President John Satterfield, quoting Iowa Supreme Court). For further variations on the theme, see Rhode, *supra* note 195, at 3 n.2.

225. In one survey, over 80% of respondents agreed that "many things that lawyers handle—for example, tax matters or estate planning . . . can be done as well and less expensively by nonlawyers." BARBARA A. CURRAN, *THE LEGAL NEEDS OF THE PUBLIC: THE FINAL REPORT OF A NATIONAL SURVEY* 231 (1977). For other examples, including public referenda, see Rhode, *supra* note 195, at 3-4; Rhode, *supra* note 65, at 214-15.

226. For a general discussion, see SIDNEY L. CARROLL & ROBERT J. GASTON, *OCCUPATIONAL LICENSING: FINAL REPORT* (1977); Daniel B. Hogan, *The Effectiveness of Licensing: History, Evidence, and Recommendations*, 7 *Law & Hum. Behav.* 117 (1983); see also Walter Gellhorn, *The Abuse of Occupational Licensing*, 44 *U. CHI. L. REV.* 6, 16 (1976) (arguing that occupational licensing has resulted in higher costs to the consumer and has reduced competition).

227. For a discussion, see Rhode, *supra* note 195, at 45-48; Rhode, *supra* note 65, at 211-12.

current regulatory patchwork appears more responsive to professional than public interests. As one consumer advocate has put it, rules on lay practice reflect little more than "territorial truces between the warring professions."<sup>228</sup> What is needed instead is a radical restructuring of the current cartel.

Traditional justifications for bans on lay competition are "grounded in the need of the public for integrity and competence of those who . . . render legal services."<sup>229</sup> This rationale assumes that existing bar licensing structures are necessary and effective in guaranteeing such qualities. But as earlier discussion indicates, this assumption appears unpersuasive, at least with respect to areas where demand for lay services is greatest. The growing specialization in legal work, coupled with a greater reliance on paralegals and routinized case-processing systems, undercuts much of the traditional rationale for banning competition. Law school and bar exam requirements provide no assurance of expertise in areas involving routine form processing such as divorce, landlord-tenant disputes, bankruptcy, welfare claims, tax preparation, and real estate transactions. In many jurisdictions here and abroad, nonlawyers frequently handle such matters with no apparent adverse effects.<sup>230</sup> Surveys of federal administrative agencies, consumer regulatory organizations, reported judicial decisions, and bar enforcement committees generally reveal no significant incidence of customer injury from lay practice.<sup>231</sup> So too, the only research on customer satisfaction finds higher approval ratings for nonlawyer specialists than for lawyers.<sup>232</sup>

Partly in response to such findings, an increasing number of state courts, legislatures, and bar organizations have begun consid-

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228. Alan Morrison, *Defining the Unauthorized Practice of Law: Some New Ways of Looking at an Old Question*, 4 NOVA L.J. 363, 370 (1980).

229. MODEL CODE EC 3-1.

230. See JOHN H. MERRYMAN & DAVID S. CLARK, *COMPARATIVE LAW: WESTERN EUROPEAN AND LATIN AMERICAN LEGAL SYSTEMS* 456-57 (1978); MICHAEL ZANDER, *LEGAL SERVICES FOR THE COMMUNITY* 335 (1978); Rhode, *supra* note 65, at 215; Rhode, *supra* note 195, at 85-90.

231. See Rhode, *supra* note 194, at 85-86; Rhode, *supra* note 64, at 216-17, 230-31. The exception is immigration, where consumers' lack of knowledge of American legal structures and their unwillingness or inability to invoke complaint mechanisms raise special concerns. See Rhode, *supra* note 64, at 231-32.

232. REPORT OF THE STATE BAR OF CALIFORNIA COMMISSION ON LEGAL TECHNICIANS Exhibit 2, 3 (1990) (about three-quarters of respondents were satisfied with help provided by lay specialists, compared to 64% who reported satisfaction with attorneys' help).



ering proposals to liberalize unauthorized practice rules.<sup>233</sup> Although these proposals generally have been quite limited in scope, they could pave the way for broader initiatives. Such initiatives should ensure that the extent of regulation bears a close relationship to the demonstrable harms of lay practice and to the costs of foreclosing consumer choice. The need for anticompetitive constraints should be proven, not assumed, and the least restrictive oversight structures should be tried first. If problems develop, measures short of categorical bans on lay services deserve consideration, such as registration, mandatory malpractice insurance, or licensing structures requiring minimum qualifications.<sup>234</sup>

In addition, bar, judicial, and governmental initiatives could provide more assistance to individuals on routine matters. Examples include expanded *pro se* clerks' offices, greater public education programs, and Citizens Advice Bureaus modeled on those of some European programs.<sup>235</sup> Finally, and most important, control over policies governing lay competition should not rest with groups to be regulated or their lawyer competitors.

### 3. Interprofessional Competition

For particularly disempowered groups, one final way of increasing accountability to client concerns is through alternative delivery structures. Greater experimentation with vouchers for criminal defendants is an obvious possibility. Under current systems, criminal defendants with court-appointed counsel report significantly less satisfaction with their lawyers' performance than parties who have retained their own counsel, even where there is no measurable difference in case outcomes.<sup>236</sup> In general, defendants see assigned attorneys as part of the system, who have "nothing to gain" by fighting hard; they "[get their] money either way."<sup>237</sup> These attitudes are well captured by the title of Jonathan Casper's landmark

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233. Rosalind Resnick, *Legal Techs Face Regulation*, NAT'L L.J., June 22, 1992, at 3.

234. See Rhode, *supra* note 195, at 94-96; Rhode, *supra* note 65, at 231.

235. See Gary Bellow, *Legal Services to the Poor: An American Report*, in ACCESS TO JUSTICE AND THE WELFARE STATE, 49, 67 (Mauro Cappelletti ed., 1981).

236. See Roy B. Flemming, *Client Games: Defense Attorney Perspectives on Their Relations with Criminal Clients*, 1986 AM. B. FOUND. RES. J. 253, 254 n.3, 276.

237. Jonathan D. Casper, *Did You Have A Lawyer When You Went to Court? No, I Had a Public Defender*, YALE REV. L. & SOC. ACTION, Spring 1971, at 4, 7; see also JONATHAN D. CASPER, AMERICAN CRIMINAL JUSTICE: THE DEFENDANT'S PERSPECTIVE 105-06 (1972) (finding that "[n]early 80% of [surveyed criminal defendants] represented by public defenders doubt[ed] that their lawyer was on their side.").

article, "*Did You Have a Lawyer When You Went to Court? No, I Had a Public Defender.*"<sup>238</sup> A system that gives defendants some choice in their counsel is likely to improve lawyer-client relationships and could slightly increase controls over lawyer performance.

How much improvement such a system would bring may partly depend on the adequacy of consumer information and bar regulatory systems. Without improvements in current structures, a pure voucher system may offer few objective advantages over a public defender office, which at least provides peer review and insulation from financial self-interest. But in indigent defense systems that already rely on largely unsupervised private counsel, giving clients greater market power might have payoffs in attorney performance. At the very least, a voucher system with explicit cost ceilings could prove beneficial by increasing pressure for change. Providing individual defendants a voucher for \$63 is more likely to arouse judicial (if not popular) concern than retaining a system that covertly provides that level of resources per case.<sup>239</sup>

#### IV. SOCIALIZATION

In many ways, the most elusive but also the most important strategy for institutionalizing professional ethics involves professional socialization. At least in the short term, most of the regulatory and market strategies endorsed above will depend on bar support. To alter professional ethics will require a sustained commitment to that enterprise. No such commitment has been apparent among much of the bar for much of its history. A crucial first step in changing professional culture is to change the socialization processes that perpetuate it.

So too, as practitioners themselves generally acknowledge, the most important influence in resolving ethical issues, apart from general upbringing, is professional environment.<sup>240</sup> This environment is, in turn, responsive to socializing forces that many practitioners also find influential, such as legal education and formal codes.<sup>241</sup> Although much of professional culture is beyond our

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238. Casper, *supra* note 237.

239. Schulhofer, *supra* note 36, at 1999 (noting that "[o]ur present methods . . . hide the real value of defense services afforded the indigent" and "tend[] to approximate [a system] in which there is no meaningful representation").

240. ZEMANS & ROSENBLUM, *supra* note 93, at 173, 194.

241. *See id.* at 176 (stating that about one-half of those who had professional responsibility courses gave them some credit in resolving ethical issues); Dan Culhane et al.,

conscious control, at least some forces could, and should, be subject to change.

### A. *Ethical Codes*

Over the past half century, as the bar's increasing size, specialization, and heterogeneity have eroded informal regulatory controls, the trend has been to place greater reliance on official codes. In the process, aspirational norms have largely given way to minimal rules. The result does not necessarily reflect what most commentators (or even lawyers) would consider right or moral. And the danger in diluting the ethical content of ethical codes is that they will nonetheless pass for ethics. New entrants are socialized to the lowest common denominator of conduct that a highly self-interested group will tolerate.

As a consequence, certain crucial functions of professional codes are undermined or overlooked. Particularly in contexts where the threat of formal sanctions is remote, an important role of codified norms is symbolic and educational; they can sensitize professionals to the full normative dimensions of their choices. A collective affirmation of professional values may have some effect simply by supplying, or removing, one source of a rationalization for dubious conduct. Standards pitched at a more demanding level can reinforce the lawyer who would prefer the ethical course but is reluctant to appear sanctimonious.<sup>242</sup>

If professional codes are to serve this role, they must demand a higher level of conduct than that reflected in current rules. To be sure, standards that stray too far from lawyers' collective or individual self-interest will seem irrelevant for the resolution of practical problems. But it by no means follows that existing rules have stretched the limits of what it is reasonable to expect from most attorneys on most occasions.

As previous discussion suggests, the most fundamental problem with current codes stems from professional dominance in the drafting process. If, as Roscoe Pound once put it, the ABA is not the "same sort of thing as a retail grocers' association,"<sup>243</sup> self-regulation brings out more of the similarities than the differences. A

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Regulation of Professional Conduct Through the Rules of Legal Ethics (1991) (unpublished manuscript, on file with author) (noting that two-thirds of surveyed practitioners credited education as helpful).

242. Rhode, *supra* note 5, at 648.

243. ROSCOE POUND, *THE LAWYER FROM ANTIQUITY TO MODERN TIMES* 7 (1953).

further problem in bar codification processes stems from the insistence on uniform standards for increasingly diverse professional settings. The gap in normative expectations between, say, a Wall Street specialist in takeover litigation and a small-town family lawyer are as important as the commonalities. The push toward universal rules has led to higher levels of abstraction and lower common denominators in regulatory standards than is desirable for ethical guidance.

A more promising alternative would be to reduce the profession's influence in the definition of uniform minimum rules, and to expand its role in the development of voluntary codes. Some specialized bar groups have drafted standards that are more specific and in some respects more demanding than the ABA Code or Model Rules. Examples include Standards of Conduct by the American Academy of Matrimonial Lawyers and the Guidelines On Tax Practice by the ABA Tax Section Committee on Standards of Tax Practice. Such standards, if reinforced by courts, bar ethics committees, and workplace policies, could encourage more ethically reflective decision making.

So too, alternative bar organizations could play a more prominent role in professional reform. Groups such as the Chicago Council of Lawyers and the Association of the Bar of the City of New York often mobilize around a progressive vision and could profitably influence more issues of regulatory policy.<sup>244</sup>

It is, of course, difficult for bar groups to sustain a broad-based membership, maintain credibility, and pursue policies that threaten professional concerns as many lawyers currently perceive them.<sup>245</sup> Yet greater opportunities for progress might arise by building alliances with other public interest organizations. Specialized bar associations could also intentionally recruit members who shared convictions about the need for change or who were somewhat insulated from the most direct pressures of practice, such as academics or government attorneys.

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244. MICHAEL J. POWELL, FROM PATRICIAN TO PROFESSIONAL ELITE: THE TRANSFORMATION OF THE NEW YORK CITY BAR ASSOCIATION (1988); Michael J. Powell, *Anatomy of a Counter Bar Association: The Chicago Council of Lawyers*, 1979 AM. B. FOUND. RES. J. 501.

245. Powell, *supra* note 244, at 529-31.

## B. Legal Education

The importance of legal ethics in legal education has been often pronounced but never institutionalized. Despite a century's worth of commission recommendations and ceremonial homilies, law schools have done little to translate their rhetorical commitments into curricular priorities.<sup>246</sup> That failure is apparent in two central respects: in the way that most institutions marginalize professional responsibility instruction; and in the skewed model of professionalism that prevailing educational structures reinforce.

### 1. Professional Responsibility

In the mid 1970s, largely in response to lawyers' role in Watergate scandals, the ABA mandated that all accredited schools offer instruction in professional responsibility. For the most part, this instruction now occurs through a required course that is often viewed as "the dog of the law school [curricula] . . . presented to vacant seats or vacant minds."<sup>247</sup> Surveyed students have found professional responsibility courses too theoretical or not theoretical enough; too removed from the actual context of practice and too uninformed by interdisciplinary frameworks from history, philosophy, psychology, sociology, economics, and so forth.<sup>248</sup> Part of the problem lies in pressures to structure the course as statutory analysis of ABA codes—a rule-bound conception of legal ethics that has little to do with ethics.<sup>249</sup> Yet students who must pass multiple choice professional responsibility bar exams often resist alternatives. In one all too typical case, classmates learned to avoid taking ethics with a faculty member who "ask[ed] a lot of uncomfortable questions about what you think is right, and never spen[t] any time teaching you the rules for the exam."<sup>250</sup>

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246. This history is reviewed in Deborah L. Rhode, *Ethics by the Pervasive Method*, 42 J. LEGAL EDUC. 31, 33-38 (1992).

247. Dale C. Moss, *Out of Balance: Why Can't Law Schools Teach Ethics?*, STUDENT LAW., Oct. 1991, at 19, 19; Rosemary C. Harold, *Dilemmas: Ethics Are Lawyers' Biggest Concern—So Why Isn't There Any Rational Way to Teach Them in Law School?*, STUDENT LAW., Dec. 1989, at 9, 9 (describing conventional student wisdom that "ethics classes are a joke" and "can be skipped often and without guilt").

248. Rhode, *supra* note 248, at 41; see also W. BRENT COTTER, PROFESSIONAL RESPONSIBILITY INSTRUCTION IN CANADA: A COORDINATED CURRICULUM FOR LEGAL EDUCATION 2-26 (1992); ZEMANS & ROSENBLUM, *supra* note 93, at 176-87; Ronald M. Pipkin, *Law School Instruction in Professional Responsibility: A Curricular Paradox*, 1979 AM. B. FOUND. RES. J. 247, 257-59.

249. William H. Simon, *The Trouble with Legal Ethics*, 41 J. LEGAL EDUC. 65, 65-66 (1991).

250. Daniel S. Kleinberger, *Ethos and Conscience—A Rejoinder*, 21 CONN. L. REV. 397,

Not only are there problems in the way professional responsibility is taught, there are even greater problems in the way that it is not taught. A recent survey of some 130 leading casebooks in fourteen fields found that the median amount of coverage of ethical issues was 1.4% of total pages; much of that coverage consisted of simply reprinting relevant rules.<sup>251</sup> This inattention to ethical questions as they arise in substantive coursework marginalizes the moral dimensions of daily practice. Faculty who decline, explicitly or implicitly, to address such questions encourage future practitioners to do the same. Curricular priorities are apparent in subtexts as well as texts—in what is left unsaid as well as said. Too often, students will view their mandatory course as an add-on, a public relations digression from what is really important. Every law school does, in fact, teach some form of ethics by the pervasive method, and pervasive silence speaks louder than formal policies and commencement platitudes.<sup>252</sup>

A better alternative would be to supplement courses in professional responsibility with more sustained coverage throughout the curriculum. The aim should be both to broaden and deepen understanding of ethical problems and regulatory responses. We should not only build awareness of current rules, but also subject them to critical scrutiny. More cross-professional, cross-cultural, and cross-disciplinary material could help explore structural causes of ethical dilemmas and the merits of particular regulatory responses. It is, for example, possible to foster a critical assessment of the American bar's sweeping confidentiality obligations by testing their premises against philosophical critiques and actual experiences of other professional groups.

That is not to overstate the importance of ethical instruction in shaping ethical behavior. A few classroom hours cannot supplant what individuals learn over sustained periods from families, peers, churches, and popular culture. Nor can the best educational experience necessarily counteract the financial and psychological pressures of practice. But it can increase awareness of their institutional foundations and suggest better regulatory responses. Most research indicates that well-designed ethics courses can improve capacities for moral reasoning, and that there is some modest relation between moral judgment and moral behavior.<sup>253</sup> In areas where

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401 n.23 (1989).

251. Rhode, *supra* note 246, at 41 & n.52.

252. *Id.* at 32.

253. James Rest et al., *Life Experiences and Developmental Pathways, in* MORAL DE-

professionals' own individual or collective concerns do not coincide with those of the public, students can benefit from analyzing the gap before they have practical reasons to discount its existence.

## 2. Educational Culture

If we are truly committed to inspiring professional responsibility during professional training, it is not enough to change the ethics curriculum. We need also to change our institutions. Each law school models, or fails to model, professional values along multiple dimensions, and the ethics it practices are not necessarily those it professes.

That gap has not gone unnoticed within the legal academy. Increasing attention has focused on the competitive, confrontational, and combative atmosphere of professional training and the unduly adversarial norms that it fosters.<sup>254</sup> The search for knowledge too often becomes a scramble for status in which participants vie with each other to impress rather than inform.<sup>255</sup> Little attention centers on the development of interpersonal or collaborative skills and alternative dispute resolution.

Current educational approaches can also be corrosive in other respects. The impersonality and abstraction of large classroom settings, the relative inattention to lawyering skills, the lack of focus

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VELOPMENT: ADVANCES IN RESEARCH AND THEORY 28, 31-42 (James R. Rest ed., 1986) [hereinafter MORAL DEVELOPMENT]; James R. Rest & Stephen J. Thoma, *Educational Programs and Interventions*, in MORAL DEVELOPMENT, *supra*, at 59-78; Walter Mischel & Harriet N. Mischel, *A Cognitive Social-Learning Approach to Morality and Self-Regulation*, in MORAL DEVELOPMENT, *supra*, at 84, 101-07; James R. Rest, DEVELOPMENT IN JUDGING MORAL ISSUES (1979) (summarizing studies that find a correlation between stages of moral reasoning and experimental measures of behavior such as cheating, promise keeping, and susceptibility to group pressure, as well as "naturalistic" measures of behavior such as delinquency and professional performance ratings); Augusto Blasi, *Bridging Moral Cognition and Moral Action: A Critical Review of the Literature*, 88 PSYCHOL. BULL. 1, 37 (1980) (concluding that most recent studies suggest a correlation between developmental stages in moral reasoning and altruism, honesty, and resistance to peer pressure); James R. Rest, *Morality*, in *Cognitive Development*, 3 HANDBOOK OF CHILD PSYCHOLOGY 556-629 (Paul H. Mussen ed., 1983) (overview of moral development literature); Stephen J. Thoma et al., *Moral Judgment Behavior, Decision Making, and Attitudes*, in MORAL DEVELOPMENT, *supra* note 2, at 133-75 (summarizing studies finding correlation between moral judgment and behavior).

254. See Carrie Menkel-Meadow, *Feminist Legal Theory, Critical Legal Studies, and Legal Education or "The Fem-Crits Go to Law School,"* 38 J. LEGAL EDUC. 61 (1988); Roger C. Cramton, *The Ordinary Religion of the Law School Classroom*, 29 J. LEGAL EDUC. 247 (1978).

255. Deborah L. Rhode, *Missing Questions: Feminist Perspectives on Legal Education*, 45 STAN. L. REV. 1547 (1993).

on real clients with real problems, the insensitivity to racial, ethnic, and gender bias, and the unwillingness of most institutions to require pro bono service, all send a message about professional responsibility that no required course can counteract.<sup>256</sup> Faced with a steady succession of hard cases and unstable distinctions, students quickly learn that "there are no answers but just arguments."<sup>257</sup> "Thinking like a lawyer" too often translates into suspension of judgment: The result is agnosticism, relativism, or cynicism, and a retreat into role that denies personal responsibility for professional choices.

These are not new laments. Nor is there any lack of alternative educational models. We know that the most effective ways of teaching moral analysis and encouraging altruistic conduct are through more cooperative, interactive learning processes.<sup>258</sup> We also know that clinics and pro bono programs provide some of the only opportunities for many students to encounter the legal world inhabited by the have-nots and to cope with ethical issues in realistic practice settings. What we need is a commitment of resources that will make more of these educational opportunities available.

That commitment must extend beyond the law schools. The only realistic way of building consensus for change is through education that is conceived as a process, not a credential. We urgently need continuing legal education, but not in the watered down form that current mandatory programs demand.<sup>259</sup> What could make more of a difference are sustained opportunities for dialogue in smaller, practice-specific settings where lawyers can talk seriously about ethical dilemmas and the structures that create them.

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256. DUNCAN KENNEDY, *LEGAL EDUCATION AND THE REPRODUCTION OF HIERARCHY: A POLEMIC AGAINST THE SYSTEM* (1983) (discussing abstraction and authoritarian structures); E. Gordon Gee & Donald W. Jackson, *Current Studies of Legal Education: Findings and Recommendations*, 32 J. LEGAL EDUC. 471, 488-94 (1982) (discussing skills); Rhode, *supra* note 255 (discussing studies concerning bias); Rhode, *supra* note 246, at 55 (discussing small number of pro bono requirements and the failure to include faculty).

257. Stewart Macauley, *Law Schools and the World Outside Their Doors II: Some Notes on Two Recent Studies of the Chicago Bar*, 32 J. LEGAL EDUC. 506, 524 (1982); *see also* KENNEDY, *supra* note 256, at 20-21.

258. *See* Carrie Menkel-Meadow, *Is Altruism Possible in Lawyering?*, 8 GA. ST. U. L. REV. 385, 416-17 (1992); Rhode, *supra* note 246, at 46-47. *See generally* HOWARD LESNICK, *BEING A LAWYER* (1992).

259. The minimal number of hours required, the absence of any examination for participants, and the lack of efforts to monitor the quality of effectiveness of particular programs cast doubt on the usefulness of the current CLE system. *See text at supra* note 94.



## V. CONCLUSION

This Essay has skimmed many surfaces. That strategy was deliberate, since occasions for such an overview are all too infrequent. Conventional conversations about professionalism tend to alternate between sweeping descriptions of "the problem" and extremely limited proposals to address it. That mismatch is hardly surprising. Lawyers as a group are diverse, divided, and anything but disinterested on matters affecting self-regulation. The politics of professional reform make it far easier to invoke abstract ideals than to invite the costs and conflicts of implementation. But more could be accomplished if a greater number of lawyers, individually and collectively, acknowledged that fact and openly confronted the barriers to effective reform.

That objective is hardly unrealistic. No occupational group in American history has a more distinguished tradition of leadership in the struggle for social justice. On matters not involving its own regulation, the bar has played a critical role in bridging the gap between ethical ideals and institutional constraints. The challenge remaining is to turn those talents and traditions inward. Through that process, we may begin to give greater practical content to professional aspirations.